Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ROBERT M. DRASKOVICH and DEAN Y. KAJIOKA

Petitioners,

v.

ROBB EVANS & ASSOCIATES, L.L.C. and
FEDERAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN GREGORY WHITE
NAMAN, HOWELL,
SMITH & LEE, L.L.P.
P.O. Box 1470
Waco, Texas 76703
(254) 755-4100

Attorneys for Petitioners

196130

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Issue Number 1:

Draskovich and Kajioka had no independent duty to investigate the source of their fees, other than to compare the payment to the District Court orders existing at that time. The Fifth Circuit's decision – that lawyers are obliged to "audit their clients" to determine the source of the fee paid is at odds with Federal Rules of Procedure, equitable principles and case law in the circuits.

Issue Number 2:

The right to counsel is guaranteed by the Constitution, and should not be superseded by a District Court order on a preliminary matter.

Issue Number 3:

At the time that Draskovich and Kajioka were paid their retainers, the party making the payment was not the subject of any court order. The Court had not even been asked to make a ruling that would have prevented the money being paid to a lawyer. An after the fact decision that the money was tainted cannot be used to support a forfeiture.

LIST OF INTERESTED PARTIES

Robert M. Draskovich	Petitioner / Non-Party in District Court
Dean Y. Kajioka	Petitioner / Non-Party in District Court
Federal Trade Commission	Plaintiff /Respondent
Robb Evans & Associates	Respondent

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Robert M. Draskovich & Dean Y. Kajioka file this Petition for Writ of Certiorari. In sofar as is possible, the parties will be referred to by name.

OPINIONS BELOW

This case originated in the United States District Court for the Western District of Texas. The District Court ordered Draskovich and Kajioka to repay fees that they had been paid by persons who were involved in the litigation that involved the Federal Trade Commission and Assail. The District Court's orders are included in Appendix B,C, D. Draskovich and Kajioka appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued a published opinion. *Federal Trade Commission v. Assail*, 410 Fed.3rd 256 (5th Cir. 2005). That opinion is included as Appendix A. The Opinion was issued on May 19, 2005.

STATEMENT OF JURISDICTION

Jurisdiction of the Court is founded on 28 U.S.C. § 1254(1). This Court should grant this Petition because the decision of the Fifth Circuit, decided important questions of federal law that had not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

14th Amendment, U.S. Constitution:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6th Amendment, U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 65, Fed. R. Civ. P.:

* * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

* * * *

INTRODUCTION

The Fifth Circuit held, in this case, that lawyers have a professional duty to "audit" their clients to determine the source of any fee that is paid. The purpose behind this newly imposed duty is to insure that the fee does not come from an inappropriate source.

The Fifth Circuit's new "duty to audit" is specifically at odds with other circuits. The Sixth Circuit previously discussed the lawyer's duty to investigate the source of his fee in 1988. *In re Bell & Beckwith*, 838 F.2d 844, 848 (6th Cir. 1988). The *Bell and Beckwith* case suggested two standards. Under the insolvency standard, if defense counsel has a subjective belief that the total assets belonging to the client exceed the fraudulent amount named in the controversy, then the attorney should be found to be without inquiry notice, and the duty to inquire never arises. On the other hand, under the nature of the property standard, the very nature and character of the property received by the attorney may put her on notice that the property may be derived from the proceeds of a fraudulent conveyance. *Id* at 849. Both of these standards balance the individual's right to representation against the interests of the public in a judicial system that proscribes fraudulent conduct. Both standards are capable of practical application in almost every case, and both standards are consonant with the principles that apply to Temporary Restraining Orders or Injunctions.

The Fifth Circuit's standard – requiring an "audit" of the client's tendered fee – introduces loaded terminology (implying an accounting process virtually guaranteeing accuracy) into the relationship between lawyer and client that is unnecessary and impractical. Moreover, the new standard is actually at odds with other authority. In *CFTC v. Co. Petro Marketing Group, Inc.*, 700 F.2d 1279 (9th Cir. 1983), the Court held that the duty of a lawyer to inquire with regard to his fee is actually the duty to inquire into the precise terms of a Court order. The *Co. Petro* standard is

precisely what Draskovich and Kajioka did, and the standard that they argue is appropriate. The Fifth Circuit's "audit" standard fails to take into account what conduct is actually prohibited by a court order, and focuses completely on whether taking a fee is morally right or wrong.

Finally, in *Federal Savings & Loan Insurance Corp. v. Dixon*, 835 F.2d 554, 557 (5th Cir. 1987), the Fifth Circuit approved the payment of attorney's fees from a pool of frozen assets by recognizing that defendants have some rights to obtain counsel in criminal cases. The Fifth Circuit held, in *Dixon*:

> Since the preliminary injunction took effect, however, FSLIC has argued more stringently that the defendants should not be allowed to use the saving institution's assets to defend themselves in actions brought against them for ruining the institution. As compelling as that argument is, and despite considerable evidence that its factual premise is correct, this suit was brought to establish the defendants' wrongdoing; the court cannot assume the wrongdoing before judgment in order to remove the defendant's ability to defend themselves. ***The basis of our adversary system is threatened when one party gains control of the other party's defense as appears to have happened here.*** Thus we conclude that some kind of an allowance must be made to permit each defendant to pay reasonable attorneys' fees if he is able to show that he cannot pay them from new or exempt assets; ***the burden, however, will be on the defendant to satisfy the court that he can secure the services of an attorney only if assets subject to the freeze order are released.*** *Id* at 565, (emphasis added).

This reasoning has been adopted by the 11th Circuit in a case involving the FTC – *In re Dolen*, 265 B.R. 471, 474 (2001). The Court should grant this Petition to resolve the split among the circuit on this critical issue.

STATEMENT OF THE CASE

(a) Course of Proceeding & Disposition of the Case Below

This suit began on January 9, 2003. The FTC filed a Complaint alleging that the defendants had misrepresented products sold by telemarketing. At the request of the FTC, the District Court entered a Temporary Restraining Order, and appointed a Receiver. The Receiver seized property in Utah on January 15, 2003. (R. 211). One of the primary defendants sued by the FTC was Kyle Kimoto. Immediately after learning of the suit, Kimoto went to a lawyer – Robert Draskovich. Draskovich and Kimoto entered into a fee agreement that contemplated representation in a criminal proceeding, and assistance to other counsel in this case. (R. 526-527). Draskovich had no prior relationship with Kimoto; the initial meeting on the 16th was the first time the two had met. (R. 754). The agreed fee was $200,000. (R. 527) (R. 1073-1074). Draskovich was paid in full by January 17, 2003. (R. 754).

During the seizure of assets on January 15th in Utah, the Receiver seized the assets of Valdine Management. Valdine was not named as a defendant in the FTC's Complaint, nor was its president and owner Steve Henriksen mentioned in the Complaint. After having the business seized, Valdine and Henriksen went to a lawyer – Dean Kajioka. Valdine paid Kajioka a fee of $60,000, and signed a retainer agreement. (R. 1073-1074). Kajioka had been paid in full by January 22, 2003. (R. 1080-1081; 1096). The litigation involving the FTC and Assail (among a number of other parties) proceeded before the District Court, with Draskovich and Kajioka performing rather typical legal services that were contemplated by their retainer agreements.

Draskovich eventually filed an Application for Attorney's Fees and Costs seeking the District Court's approval of his fee arrangement, and approval that the fee was reasonable and necessary in accordance with federal

standards. (R. 517-538). The Application was decided solely "on the papers", and the District Court denied the application. (App. C). In its order, the District Court not only denied approval, but ordered the return of $210,000. The District Court said that if Draskovich did not return the money within 30 days, he was to show cause why he should not be held in contempt. (App. C).

As to Kajioka, the FTC and the Receiver instituted court proceedings to require Kajioka to return the fee he had been paid. On August 21, 2003, the FTC and the Receiver filed similar motions to hold Kajioka in contempt. Kajioka responded to the Show Cause Order issued in connection with the Motion for Contempt. The District Court initially found that Kajioka was not in contempt, but ordered Kajioka to return $50,000 to the Receiver. (App. D). Kajioka informed the Court that of the $60,000 initially paid, he had forwarded $10,000 to another lawyer for other work on behalf of Valdine and Henriksen. The Receiver had already recovered that $10,000. So, the District Court changed his ruling, and on November 26th, ordered Kajioka to return $40,000. (App. B).

(b) Statement of Facts

Draskovich is a Nevada lawyer who was hired to represent Kyle Kimoto after the FTC filed its suit. (R. 699). The purpose of his representation was related to the FTC's lawsuit, but he was retained for representation in ongoing state and federal criminal investigations. (R. 527). Draskovich was paid an non-refundable fee of $200,000. (R. 527). He received the fee from Alliance Solutions. (R. 754). He was assured that the funds were not from a party in the case, and was assured that Alliance had not participated in the allegations submitted by the government. (R. 754). In fact, the source of his fee was not mentioned in either the pleadings on file in the case, nor in the Temporary Orders issued by the District Court. During the course of his representation, Draskovich spent over 592 hours on work for Kimoto. (R. 526-238). At a rate of $250 per hour, with expenses approaching $13,000 his time and expense justifies the retainer.

Draskovich worked a substantial number of hours on the case without any comment from the FTC or the Receiver about his fee. The FTC and the Receiver did not even mention Alliance Solutions until approximately 8 months later, when Alliance was included in the Permanent Injunction. It was not until Kimoto settled that the FTC and the Receiver made an issue of Draskovich's fee.

The FTC and the Receiver suggested to the District Court that Draskovich had violated the Temporary Restraining Order by receiving money from Alliance, and that Draskovich should be required to return the money he received. (App. C). Their theory was that Alliance was a financial conduit for, or was controlled by Kimoto, and was therefore bound by the District Court's asset freeze from the beginning. Draskovich's receipt of a fee was, according to these allegations, equivalent to receiving money from a defendant prohibited from making the payment. But, as mentioned earlier, this allegation was not made in the pleadings, not affirmed by any court order, and apparently existed only in the mind of the FTC and the Receiver after many months of investigation. Draskovich certainly could not have known that the District Court would adopt this argument at the time that he accepted the fee.

Kajioka is a Nevada lawyer who was hired to represent Valdine and its owner Steve Henriksen after the Receiver seized the property at Valdine's physical location in Utah. (R. 699). The purpose of his representation was also related to the FTC's lawsuit. Like Draskovich, he was retained for representation in ongoing state and federal criminal investigations. (R. 699-700). Kajioka was paid a non-refundable fee of $60,000. (R. 1073-1074). During the course of his representation, Kajioka spent over 217 hours on work for Henriksen and Valdine. (R. 702-713). At a rate of $300 per hour, his time justifies the retainer.

One of the first acts Kajioka performed in his representation was to contact the Receiver's office to inquire about Valdine. He made the call the day after he was fully

paid. (R. 1096). When he called the Receiver's office, he was told that the Receiver was not aware of the identity of Valdine, and that the seizure of Valdine's business may have been a mistake. Kajioka continued his work, and it was not until August that the FTC and the Receiver challenged Kajioka's fee.

The FTC and the Receiver suggested to the District Court that Kajioka had violated the Temporary Restraining Order by receiving money from Valdine, and that Kajioka should be held in contempt. (App. B, D). Their theory was that Valdine (like Alliance) was a financial conduit for, or was controlled by Kimoto. Kajioka's receipt of a fee was, according to these allegations, equivalent to receiving money from a defendant prohibited from making the payment. This allegation was not made in the pleadings, not affirmed by any court order, and apparently existed only in the mind of the FTC and the Receiver after many months of investigation. Kajioka certainly could not have known that the District Court would adopt this argument at the time that he accepted the fee.

The District Court eventually considered the Kajioka contempt motion at the same time as other allegations of contempt. At the end of the hearing, the District Court found that Kajioka was not in contempt, but still ordered him to repay $50,000. (App. 5). The District Court apparently believed that Kajioka had earned a portion of the fee he was paid, but declined to accept Kajioka's argument that he had earned all of it. In reality, Kajioka had received $60,000, and had paid out $10,000 to another lawyer. That $10,000 had already been recovered by the Receiver. (R. 1123). So, the District Court modified his decision. He ordered Kajioka to return $40,000, not $50,000 (R. 1123-1124).

ARGUMENT

I. Draskovich and Kajioka had no independent duty to investigate the source of their fees, other than to compare the payment to the District Court orders existing at that time. The Fifth Circuit's decision – that lawyers are obliged to "audit their clients" to determine the source of the fee paid is at odds with Federal Rules of Procedure, equitable principles and case law in the circuits.

Draskovich and Kajioka were both hired after the District Court entered a Temporary Restraining Order. Under the most generous understanding of the facts, both lawyers read and understood the Order that the District Court entered. But the order does not restrain Alliance or Valdine – the parties from whom the lawyers received their fee. In fact, neither Alliance nor Valdine were mentioned in the Temporary Restraining Order. Alliance and Valdine were also absent from the pleadings, and every other piece of paper available to the public at the time that these companies paid fees to lawyers for criminal representation. Alliance's name did not appear in any court paper until August.[1] The FTC and the Receiver assert that, despite this situation, Draskovich should have known that Alliance was subject to every prohibition in the Temporary Restraining Order. The problem is that they can point to no information, available between January 15, 2003 and April 29, 2003 that supports that assertion.[2]

Valdine's name did not appear in any court paper until February (after Kajioka was hired and paid). Henriksen still is not a defendant nor is he specifically mentioned in any

1. Draskovich concedes that the FTC and the Receiver disputed his right to payment in April of 2003, but it was still over 4months after he was paid, and after he had expended significant time.

2. The FTC and the Receiver will undoubtedly point to assertions and conclusions that were included in their Motions and Responses seeking to hold Draskovich in contempt or forcing him to return the money. But none of the assertions has a date in January of 2003.

injunctive orders. According to the FTC and the Receiver, Kajioka should have known that Valdine or Henriksen were subject to every prohibition in the Temporary Restraining Order. The problem is that they can point to no information, available between January 15, 2003 and February 4, 2003 that supports that assertion.[3] Quite simply, by ordering Draskovich and Kajioka to return money, the District Court held them to an impossibly high standard, one that does not comport with due process of law.

If the Temporary Restraining Order is read to require Draskovich and Kajioka to understand that Alliance and Kimoto, or Valdine and Henriksen are subject to its terms, it violates the principle that people must be able to understand the conduct that would expose them to liability - a component of due process of law. The cases discuss this feature of due process as the void-for-vagueness doctrine. It requires governmental prohibitions to be described or defined with sufficient definiteness and clarity "... that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Interestingly, the void-for-vagueness doctrine is concerned with the absence of any standards by which enforcement may be gauged. That concern is evident in criminal laws, and in court orders.

As this Court noted over 125 years ago in *United States v. Reese*, 92 U.S. 214, 221 (1876):

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible

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3. The FTC and the Receiver will undoubtedly point to assertions and conclusions that were included in their Motions and Responses seeking to hold Kajioka in contempt or forcing him to return the money. But none of the assertions has a date in January of 2003.

> offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

It is equally dangerous for a District Court to be able to set a net large enough to permit it to pick and choose among those that might be held in contempt, and those who would not.[4] Although the doctrine has its most usual application in reviewing legislative action, an injunction can be so vague that it cannot be enforced.

But, the point here is that neither Draskovich nor Kajioka could be required to investigate any further than the requirement that they read the injunction, and apply its specific terms to the conduct contemplated. The lawyers had no independent duty or obligation to engage in some type of "due diligence" to learn the source of the funds that he was paid as a fee.

The Fifth Circuit held that the lawyers had an absolute obligation to engage in an investigation to determine the full extent of any relationship between their clients and any of the persons or entities that were specifically enjoined. In specific terms, the Fifth Circuit held that a lawyer must "audit" his client to determine the source of his fee. Aside from the due process argument, the Rules of Procedure do not support such a duty on persons who are not parties to the case.

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4. This is not a charge lightly made. The District Court here approved a fee application for another lawyer who represented Kyle Kimoto. (R. 1375-1416). Neither the FTC nor the Receiver objected. And, another lawyer was permitted to retain $10,000 of his fee, but not the remainder. While this does not mean that the District Court held some bias or prejudice towards a particular attorney, it does suggest that the "net" was cast too large. An injunctive order that was specific would not have yielded different results for essentially the same conduct.

> [No] court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832-33 (2d Cir. 1930).

This rule was codified in the Rules of Civil Procedure. Rule 65(d) of the Federal Rules of Civil Procedure provides that injunctions are "... binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those parties in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Both Draskovich and Kajioka had the duty to understand that the entity paying a fee is not helping a named defendant do what is prohibited, and that his client is identified with the named defendant – no more. *See Herrlein v. Kanakis*, 526 F.2d 252, 253-254 (7th Cir. 1975). Both lawyers did this. Draskovich inquired specifically about the source of his fee. In his affidavit, he says:

> I was assured that any funds I was to receive were not 'tainted' and that said funds were not to be paid from a party in this case.

> On January 17, 2003, I received a wire transfer from Alliance Solutions, an entity that was not named in the government's pleadings, and an entity that I was assured had not participated in the allegations submitted by the government.
>
> Upon receiving and reviewing the voluminous pleadings and supporting exhibits I received, it was apparent that at that time that Alliance Solutions was not a party to the instant action, and that the subject funds were not frozen.

R. 754.

Kajioka likewise investigated the source of his fee. Kajioka did this. He called the Receiver. In his affidavit, he says:

> I spoke to the Receiver in the present lawsuit's representative on or about January 23, 2004, at which time I was told that the Receiver in this case was not aware of the identity of Valdine Management Co., Inc. whatsoever, and that in fact the Receiver may have inadvertently seized Valdine Management Co., Inc.'s premises and was in the process of returning control to other businesses inadvertently seized as well.
>
> I had no notice that the above seizure of Valdine's premises was related to the present lawsuit initied by the Federal Trade Commission until several weeks after this Court's Perliminary Injunction was ordered on February 4, 2003, when Steven Herniksen informed me of said Order.

R. 1096-1097. Considering the time pressures for beginning representation, the investigation is reasonable and appropriate - even if it later turned out to be mistaken.

The Receiver and its counsel expended over $500,000 in time and expense before it accumulated enough information to even assert that the fees paid were from inappropriate sources. While Draskovich and Kajioka say that the Receiver never actually proved an inappropriate relationship sufficient to justify the District Court's coercive order, neither of them can be held to a standard of investigation that it would be impossible to meet. The lawyers could not have known, within just a few days, all that the Receiver allegedly knew after an four month investigation. To require this degree of investigation imposes an impossible burden on the lawyers - which prohibits the enforcement of the order. ["Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action" *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999)].

II. The right to counsel is guaranteed by the Constitution, and should not be superseded by a District Court order on a preliminary matter.

There is no doubt that the FTC's suit, and the extraordinary remedies sought and obtained exposed a considerable number of persons and companies to investigation, even when they were not expressly named in the suit. The suit was filed in Waco, Texas allegedly because some of the illegal activity occurred there. The reach of the District Court in Waco extended to St. George, Utah, and beyond. It was accompanied by law enforcement activity, including search warrants and subpoenas. Government attorneys in charge of civil and criminal matters were involved. The litigation was managed, on the Plaintiffs' side of the case, from both coasts. And, although the District Court's order listed specific persons and companies that were subject to its initial Temporary Restraining Order, it is apparent that the FTC and the

Receiver took a very broad view of the powers granted to them.[5]

Given the breadth of the action asserted and the aggressive conduct of the FTC and Receiver in pursuing the case, a number of people sought the advice of counsel. And, each of them had the right to retain and to pay counsel of their choice. The right to counsel is of constitutional importance, *Wheat v. United States*, 486 U.S. 153 (1988). The 6th Amendment protects the right to counsel even before criminal indictments are returned.[6] This general proposition is demonstrated every day when law enforcement officials give *Miranda* warnings - noting that there is a right to remain silent . . . and the right to an attorney. The 6th Amendment protects persons whenever a criminal investigation "focuses" on a particular individual beyond the general investigation of a crime. *Escobedo v. Illinois*, 378 U.S. 478 (1964). And, the 6th Amendment right to counsel ". . . encompasses a right to counsel of choice". *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978). The right to counsel of choice is not absolute, but it is worthy of protection. *See United States v. Thier*, 801 F.2d 1463, 1471 (5th Cir. 1986).

The Fifth Circuit summarily dismissed this contention with a single sentence. It concluded that the Sixth Amendment had nothing to do with the case because the case was a civil case. In doing so, it wrongly disregarded the important rights of both Kimoto and Henriksen to

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5. The Record contains references to the fact that the FTC and the Receiver seized offices and property not based on the order, but based on their interpretation of the Order. This resulted in the closing of businesses in Utah that were later found to have nothing to do with the case, but were initially seized on the suspicions or the interpretation of the FTC and the Receiver. (R. 11, 1067 & 1096).

6. There is no dispute in the record about the reason that Draskovich and Kajioka were retained. Both were retained to represent individuals in criminal matters.

have a lawyer in connection with pending criminal investigations. There is nothing in the record that disputes the purpose of the representation provided by Draskovich and Kajioka. The FTC investigation had progressed beyond a general investigation, and had focused (in varying degrees) on both Kimoto and on Henriksen. They were both entitled to counsel under the Sixth Amendment. The Fifth Circuit's disregard of this right ignores years of compelling authority to the contrary, and endangers important principles of criminal procedure.

The general principle protecting the right to counsel is necessarily in conflict with statutes that permit seizure of property, and is in conflict with a District Court's general equitable power to appoint a receiver to seize property to be held in the custody of the court. The conflict is not a trifling matter that can be easily resolved.

For instance, in forfeiture cases under 21 U.S.C. § 853, a defendant is not necessarily entitled to block the forfeiture of funds just because he wants to use the funds to hire a lawyer. That particular statute expressly vests title in illicitly gained money in the United States upon commission of an illicit act. Cases brought under that statute then, seek to establish that the money in the possession of a defendant is actually money owned by the Government by operation of law. In other words, the property in the possession of the defendant was never legally owned by him because of the operation of the statute. It is the express declaration of Congress that the government owns the illicit gains that gives courts the power to make a seizure prior to a finding of guilt. Because the property was never legally owned by the defendant, the Supreme Court has confirmed that there can be rather severe limits on how the disputed property can be used. The "... Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though

he is without funds." *Caplin & Drysdale v. United States*, 491 U.S. 617, 624-625 (1989). But, in a suit under § 853, the Court said that no defendant has the right to right to spend money that the statute vests in the government for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. *Caplin & Drysdale* at 491 U.S. 626. When § 853 is invoked to forfeit assets, the determination is made that the assets do not belong to the defendant. Instead, they belong to the government, and the defendant cannot use the government's money for his own purposes – even if his purpose is to exercise an explicit Constitutional right under the 6th Amendment. *United States v. Monsanto*, 491 U.S. 600, 614 (U.S., 1989).

In this case, there is no doubt that Kimoto and Henriksen had the right to hire counsel of their choice. What is in doubt is whether the District Court could effectively seize the money paid to Draskovich or Kajioka as a fee based on a ruling that is preliminary at best.[7] While the power of a District Court to seize property prior to a finding of guilt is express in 28 U.S.C. § 853 (the statute involved in *Caplin & Drysdale and U.S. v. Monsanto*), it is not expressed in any of the statutes relied upon by the FTC in its Complaint. (R. 2053 – the current pleading). Although the FTC would like to be able to argue that by making a claim for violation of the FTC Act, 15 U.S.C. §41, *et seq.* or the Telemarketing Act, 15 U.S.C. § 6102, *et seq.*, it obtains ownership of the gains from those violations, the statutes contain no language

7. "Preliminary", in this instance imploes that the District Court did not even have to conclude that probable cause existed in order to freeze or seize assets. Nor was the ruling made after notice and hearing, nor was it supported by evidence other than paperwork. Even if there were a specific statute that supported a forfeiture (like § 853) the facts in this case would not meet the standard for restraint. The reason is that there is no indication that in entering the Temporary Restraining Order, the Court received evidence concerning Alliance, or Valdine or that the Court received evidence that the assets of Alliance or Valdine were likely to be subject to the remedies under the applicable statutes.

relating to the ownership of property that is remotely similar to § 853. These statutes simply list the remedies that the FTC is entitled to seek, including consumer redress, damages, restitution, and equitable relief.

In providing for these remedies, the statutes contemplate the most traditional of lawsuits – the plaintiff sues for a judgment against the defendant. The effect of the judgment is that the defendant must give up *his* property to satisfy the judgment. The statutes upon which the FTC relied in this case do not vest title in either the government (for purposes of reimbursing consumers) or in the consumer/victims (for whom the FTC may seek redress, restitution or disgorgement). The difference between §853 and these statutes cannot be overstated. Under §853, the Government sues to regain possession of property to which it holds legal title. Under the statutes here, the FTC simply seeks to make the defendants responsible for damages, restitution or disgorgement. The defendants are the owners of all money in their possession until they are legally divested (voluntarily or involuntarily). Even the receivership only brings the defendants' property into the custody of the court. It does not effect a change in title.

Therefore, the arguments of the FTC that the payment of attorney's fees is the use of ill-gotten gains to pay lawyers are simply misplaced. The statutes at issue here give the FTC the power to seek remedies on behalf of wronged consumers – a remedy that is dependent on a final finding of guilt. Even the general grant of a power to seek equitable relief does not effect the change in title to funds that is spelled out in other forfeiture statutes.

In such instances, the right to counsel (and the lawyer's right to keep the fee paid) has to supersede the FTC's desire to obtain restitution at the end of the case. The right to counsel was included in the Constitution even though it is assumed that in exercising the right to counsel, ill-gotten gains might be used by defendants who are ultimately

found guilty. Where Congress has seen fit to override this presumption (that some defendants in criminal cases will use tainted funds to hire lawyers), it has superseded this presumption expressly. In § 853, Congress has made an express statement that the title to illicit funds vests in the United States at the time they are acquired. The 6th Amendment rights that exist absent this type of express declaration cannot be erased by court-made principles of equity or by stretching the language of the FTC Act or the Telemarketing Act. Quite simply, neither Draskovich nor Kajioka can be required to return fees until the case was concluded and a finding made that restitution was owed. Given that Alliance and Valdine were not even defendants in this case, it may be that no final conclusion will ever be drawn about their liability for restitution or damages to consumers. But, it is certain that no such finding was in existence at the time that Draskovich and Kajioka were paid. The statutes upon which the suit was based do not grant the FTC, the Receiver, or the District Court any power to cause forfeiture on preliminary determinations. To read the statutes in that manner is to elevate them over the 6th Amendment right to counsel.

III. At the time that Draskovich and Kajioka were paid their retainers, the party making the payment was not the subject of any court order. The Court had not even been asked to make a ruling that would have prevented the money being paid to a lawyer. An after the fact decision that the money was tainted cannot be used to support a forfeiture.

The District Court entered its Temporary Restraining Order in this case on January 9, 2003. On January 15th, the Receiver, working with law enforcement raided the offices of Assail, Inc. in St. George, Utah. Regardless of when Draskovich or Kajioka received the Temporary Restraining Order, neither of the lawyers could have derived from the pleadings on file or the order entered that the parties

offering to pay a fee was bound by the order. When combined with their own inquiry about the source of the fee, Draskovich and Kajioka did nothing wrong in accepting the fee.

In fact, there is no theory of actual or constructive notice that would give Draskovich or Kajioka cause to investigate whether the payment tendered to him was subject to any order of the District Court at the time it was made. The pleadings do not name Alliance or Valdine. The Temporary Restraining Order does not name Alliance or Valdine, and the investigation that Draskovich made did not intimate that either Alliance or Valdine is subject to the order.

A Temporary Injunction can be binding on those who have actual notice of its contents regardless of whether they are named in it, but the one thing that a TRO cannot do is to require the reader to speculate or guess about the prohibitions in the order. The Rules of Procedure require specificity. Rule 65(d) provides, in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; *shall be specific in terms; shall describe in reasonable detail*, and not by reference to the complaint or other document, *the act or acts sought to be restrained*; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Emphasis added.

No one could read the Temporary Restraining Order and glean from it a prohibition against Alliance. This court has held that

> The injunction must give the party adequate notice of the wrong enjoined. Professor Moore states that 'loose injunctive orders are neither easily obeyed nor strictly enforceable, and are apt to be oppressive. Hence Rule 65(d) further provides that every restraining order and injunction be specific in terms. . . .' 7 J. Moore, Federal Practice ¶65.11, at 65-103 (2d ed. 1975). *See Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 126, (1948); *Wynn Oil Co. v. Purolator Chemical Corp.*, 536 F.2d 84, 86 (5th Cir. 1976).

And, this Court had said that "... one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 444 (U.S., 1974). The requirement of specificity is "... designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood ... basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).[8] The FTC and the Receiver cannot candidly argue that the Temporary Restraining Order contains fair and precise

8. The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.

International Longshoremen's Assn. v. Philadelphia Marine Trade Assn., 389 U.S. 64, 76 (1967).

notice that Alliance and Valdine are not permitted to spend money from their accounts. For even if the FTC or the Receiver could postulate a reason that the Court Orders include Alliance and Valdine, the argument could only be made by an interpretation of words such as "affiliate", "subsidiary", or "control" – terms which the order included, but did not define. Neither Draskovich nor Kajioka could know that the conduct they engaged in was prohibited. Certainly, receiving fees was in the ordinary course of their business. And, they could not know, from reading the District Court order that the entity paying the fee was subject to the Order. By claiming that the lawyers were bound by the order, the FTC and the Receiver say that the defense lawyers should know more than the Receiver's office knew, that the defense lawyers should be able to predict the Court's future rulings, or that the defense lawyers should have reviewed the Bank records of to reach the conclusion that the Receiver reached several months (and many thousands of dollars) later.

Even if the FTC and the Receiver eventually proved that Alliance or Valdine should not have paid the fees, it does not follow that the fees should be returned. The FTC cannot cite authority for the proposition that a court order may proscribe acts that have already occurred or that an injunctive order may operate in the past. By the time that the District Court made an express order that made any reference to Alliance or Valdine, the lawyers had been paid, and had performed services. It cannot be argued that the lawyers were guilty of violating an order that did not exist when they engaged in the conduct. No court may punish yesterday's conduct by tomorrow's standard. That is what the FTC and the Receiver argue for here, and it should not be affirmed.

THE COURT SHOULD GRANT THIS PETITION

Three compelling reasons exist for granting the Petition in this case. First, there is an important legal principle involved in the case. What duty does a lawyer have to ascertain the source of his fee? Congress has not spoken, in any general sense, on this topic. The Rules of Procedure do not appear to establish a general principle. The Courts of Appeal have adopted varying standards for deciding the question. And, this Court has heretofore been silent on the issue. The factual situation is not particularly unusual. The overlap between civil liability and criminal responsibility continues to blur. Lawyers are constantly exposed to cases where they must be mindful of both. Commercial practice, professional liability, corporate governance, trusts and estates, lending practices, and bankruptcy law all carry the spectre of criminal responsibility. A lawyer might be paid a fee in a routine civil case, but learn later that criminal law are implicated in his representation. Lawyers and clients need to know the standard that will apply to the payment of fees.

Second, the lawyers in this case were clearly involved in a difficult situation. The relief granted by the District Court was entered without notice. A "surprise" seizure followed – hundreds of miles from the Court's jurisdiction. The forcible seizure, accompanied by law enforcement officials, would naturally send the individuals affected in search of legal representation. The lawyers had no time to "audit" their client. Representation was needed immediately. But, the lawyers surely took the time to read the District Court's order. They made inquiry about the source of their fee. If they failed to uncover some relationship that was not volunteered by the client, they can hardly be faulted – the investigation of the Receiver that uncovered the relationship took months; involved hundreds of man-hours; and took thousands of dollars. If the lawyers had, as the Fifth Circuit required, "audited"

the client, representation would have been delayed during a critical period of time, and for a considerable period of time. And, it was not until the lawyers had invested many hours in their work that the Receiver asked the District Court to force the return of the fees. If it were so apparent that the lawyers used "ill-gotten" gains for their fee, and that they did so illegally, surely the Receiver could have made his assertions for the return of the fee earlier. The fact of the matter is that the Receiver did not know, and could not have known earlier - and neither could Draskovich or Kajioka.

THE CIRCUIT SPLIT BEFORE THIS CASE

Third, the District Courts, and the various Courts of Appeal have attempted to apply various standards to describe the duty of a lawyer to investigate the source of his fees. Contrary to the Fifth Circuit's new "duty to audit", the Sixth Circuit has completely different standards in a 1988 case. *In re Bell & Beckwith*, 838 F.2d 844, 848 (6th Cir. 1988). The *Bell and Beckwith* case suggested two standards. One standard used in the Sixth Circuit is the insolvency standard. If defense counsel has a subjective belief that the total assets belonging to the client exceed the fraudulent amount named in the controversy, then the duty to inquire further never arises. The other applicable standard in the Sixth Circuit is the "nature of the property standard." In some instances, the very nature and character of the property received by the attorney may put her on notice that the property may be derived from the proceeds of a fraudulent conveyance. *Id* at 849. Neither standard was used in this case, and neither was mentioned as being at odds with the new "duty to audit" standard.

Before the Fifth Circuit issued the opinion in this case, the courts had generally and specifically placed the duty to inquire as to the source of fees upon *someone other than a then-nonparty attorney.* Interestingly, while the Fifth Circuit's opinion places the duty of inquiry/audit upon the attorney,

another Fifth Circuit opinion written in 1987 places the duty upon the *clients* to demonstrate that their already frozen assets would not be used to further a fraud except when paying for reasonable family expenses and attorney's fees. The attorney's knowledge of the source of the fees was immaterial, and he had no independent duty to investigate absent a specific statutory provision.

In *Federal Savings & Loan Insurance Corp. (FSLIC) v. Dixon,* the defendants were alleged to have engaged in illegal lending practices, self-dealing, cooking the books, and justifying huge salaries and bonuses by posting nonexistent profits. *Federal Savings & Loan Insurance Corp. v. Dixon,* 835 F.2d 554, 557 (5th Cir. 1987). The FSLIC filed a suit and applied for a preliminary injunction preventing the defendant-officers from spending their fraudulent proceeds. *Id.* The injunction limited the allowance given to each defendant to $3500 monthly, and all family living expenses, *including attorneys fees,* had to come from this monthly allowance. *Id* at 564. In fact, the Fifth Circuit calculated the total amount of work that could be done on each defendants case, and came to the conclusion that if all $3500 of the allowance was spent on defense counsel, "each defendant could purchase thirty-five hours a month at $100 an hour—not a significant amount in major litigation." *Id.* Further, the court weighed the government's interest in vindicating the public with the defendants' need for adequate representation. Thus, this 5th circuit court placed the duty to inquire as to whether the frozen assets could be used to pay an attorney ***squarely upon the defendant,*** and created no duty for defense counsel to *audit the client to see whether exempt or other assets could be used to satisfy the fee.*

The Eleventh Circuit adopted this reasoning, and applied it in *In re Deborah R. Dolen,* where the defendant was the subject of a consumer fraud action brought by the FTC. In that case, the FTC alleged that the defendant violated § 5(a) of the FTCA by making false and deceptive representations concerning a work-at-home business

opportunity program. *In re Dolen*, 265 B.R. 471, 474 (2001). The Eleventh Circuit reasoned that the 5th Circuit *Dixon* decision suggested that "assets should be excluded from the preliminary injunction if the defendants could demonstrate that the assets 'were acquired at a time or through such means that there is no likelihood that they were acquired from the ill-gotten salaries, bonuses, etc. subject to the preliminary injunction.'" *Dolen* at 484. Finding this to be an impermissible regulatory attempt by the FTC, the Eleventh Circuit allowed Dolen to use her post-petition earnings to pay her monthly expenses and her Chapter 13 plan payments. *Id* at 486.

Obviously, there are some very peculiar similarities between the *Dolen* defendant and Kimoto in the underlying litigation. Both were sued under the FTCA for alleged violations of consumer fraud. Both were subject of FTC asset freeze orders that limited the assets available to pay reasonable expenses. In one case, a Court of Appeals approved the use of frozen assets for the payment of attorney's fees – balancing competing rights. In another case, a Court of Appeals refused to consider balancing rights, but place an affirmative duty to "audit" the client on the attorney, and prohibited any payment of fees at all.

Finally, in *U.S. v. Thier*, the defendant was indicted under the CCE, and the government requested a restraining order which would freeze all of the defendant's assets while his criminal trial was pending. *U.S. v. Thier*, 801 F.2d 1463 (5th Cir. 1986). The trial court issued an order prohibiting any sale, transfer, or disposition of the defendant's assets. *Id* at 1465. The defendant then moved to modify the order, seeking reasonable living expenses and attorneys fees. *Id.* After having this motion denied, the defendant appealed to the Fifth Circuit, which remanded the issue, with instructions to the lower court to conduct a hearing and balance the defendant's interests "in having access to funds" with the government's interests. *Id* at 1472.

In this case, the Fifth Circuit required that an attorney demonstrate that he conducted an inquiry sufficient to allow him to be "reasonably without cause to believe that the property was subject to forfeiture." *Draskovich* at 16 (emphasis added). On the other hand, the very same circuit expressed a different view regarding the congressional reach of the CCE.:

> The legislative history has to whether the government's forfeiture powers under the CCE and RICO extend to ***defense attorneys is meager.*** The only direct mention is in the following provisions:
>
> > Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case. H.R. Rep. No. 845, Pt.1, 98th Cong., 2d Sess. 19 n. 1 (1984).
>
> This issue involves consideration of the defendant's sixth amendment rights, the attorney's interest in funds or assets market for his payment, the statutory mandate that knowledge of potential forfeitability at the time of transfer defeats a third party's interest in forfeitable property, and the fact that defense counsel is necessarily aware of the potential forfeitability of his client's assets. In these regards we note that another congressional report states:
>
> > Paragraph (6) provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner

> had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture.
>
> S. Rep. no 98-255, 98th Cong., 2d Sess. 209, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3392. *Thier* at 1471 (emphasis added).

Consequently, the proposition that the forfeiture provisions of the CCE and RICO compel an attorney to conduct an inquiry into his or her client's assets is far-fetched because when viewed in a prior case *in the same court*, legislative intent indicates that Congress was reluctant to impose any duty upon a defense attorney in a criminal matter. The overriding principle here is that a defense attorney's necessarily knows the charges against his client. His knowledge that a client is accused of wrongdoing cannot defeat his attorney's interest in receiving payment out of the defendant's forfeited assets for legitimate legal services. *Thier* at 1474.

Clearly, the best rule is to allow Congress to act in this area. Congress has done so in several different contexts. Allowing the development of the law relating to the attorney's duty in the legislative field has the benefit of specificity in standards, representative determination, and limited application. A general duty to investigate offers little benefit in the usual case, but imposes significant costs on the client, the lawyer, and the lawyer/client relationship. The Court should either defer to Congress, or should hold that the lawyer has no independent duty to investigate, or should set out a workable standard (like the Sixth Circuit's standard).

CONCLUSION

There is a single, substantive reason that the District Court could not properly order Draskovich and Kajioka to return the money he received for legal fees. The money that was paid belonged to the client. The existence of a receivership does not change the ownership of the money, only the possession. A receivership brings assets belonging to one person into the custody of the court. The Court may have the power to deal with the assets, but the assets still are owned by the defendant. Since the clients own the money, the clients have a substantive right to use that money to hire a lawyer in exercise of their Constitutional rights. The 5th and 6th Amendment rights of the clients must be given precedence over a Court's desire to preserve their assets for another purpose.

The procedures used by the District Court in forcing the lawyers to forfeit their fees are also flawed. At the time that the retainer was paid, there was no order that specifically prohibited any of the clients from spending money. Neither the lawyers nor anyone else could read the Temporary Restraining order and figure out that a payment by the clients was proscribed. Both the Federal Rules of Civil Procedure and the due process clause require sufficient specificity in an injunction to permit a person to understand what the court intends to require and what it means to forbid. The District Court's order fails insofar as it attempts to bind the lawyers or the clients.

Finally, the lawyers had no legal duty to conduct an extensive investigation of the relationship between his clients and other named parties in the case. Both lawyers made a direct inquiry about the source of their fees, and both lawyers were satisfied that the fees did not come from a prohibited source. The conclusion that the lawyer reached might, in retrospect, be subject to contention, but viewed at the time of the events, it was the best that could be expected. It was the best that could practically be

accomplished. It was all that the law required at that time. Months later, the Receiver had changed his mind about the relationship – arguing that that the lawyers should have known what it took the FTC and the Receiver substantial time and man hours to learn. Requiring an audit of the client (as the Fifth Circuit required) in order to comply with the Court's order places an impossible burden on the lawyer, which cannot be the basis for a coercive order or punishment.

Respectfully submitted,

STEVEN GREGORY WHITE
NAMAN, HOWELL,
SMITH & LEE, L.L.P.
P.O. Box 1470
Waco, Texas 76703
(254) 755-4100

Attorneys for Petitioners

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 19, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-51461

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

v.

ASSAIL, INC.; ET AL,

Defendants,

ROBERT M. DRASKOVICH,

Appellant,

v.

ROBB EVANS & ASSOCIATES, LLC,

Appellee.

Appendix A

No. 03-51462

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

ASSAIL, INC.; ET AL,

Defendants,

DEAN Y. KAJIOKA,

Appellant,

v.

ROBB EVANS & ASSOCIATES, LLC,

Appellee.

Appeals from the United States District Court for the Western District of Texas, Waco

Before KING, Chief Judge, and GARZA and BENAVIDES, Circuit Judges.

KING, Chief Judge:

This consolidated appeal concerns the district court's refusal to award attorney's fees to two attorneys whose clients had their assets frozen as part of a civil case brought by the Federal Trade Commission. After the district court entered an asset freeze order, the two clients paid substantial retainers to their attorneys. In separate orders,

the district court ordered the attorneys to turn all or substantially all the funds over to the court-appointed receiver. The attorneys now appeal those orders. We AFFIRM.

I. BACKGROUND

A. Common Factual Background

The events leading to these two appeals can be traced to January 9, 2003, when Plaintiff-Appellee Federal Trade Commission ("FTC") filed a complaint in the United States District Court for the Western District of Texas. The complaint alleged that a variety of corporations and individuals, led by Kyle Kimoto and his primary operating company, Assail Inc. ("Assail") (collectively the "defendants"), engaged in a telemarketing scheme in violation of § 5(a) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule, 16 C.F.R. § 310.1-.9. [1]

At the FTC's insistence, on the day the complaint was filed, the court issued an ex parte temporary restraining order barring the defendants from continuing their scheme

1. The defendants told consumers that in exchange for an advance fee, they would receive a pre-approved MasterCard credit card. As part of the verification process, the defendants also offered consumers "free trials" of various services without indicating that acceptance of the trials would result in recurring monthly charges to the consumers' bank accounts. Using information obtained through these misrepresentations, the defendants debited each consumer's account $175 or more.

The consumers never received the benefits they were promised. Rather than receiving a credit card, consumers generally received either an application for a cash-secured debit card or an unusable plastic card with an unauthorized reproduction of the MasterCard logo and meaningless numbers embossed on the card. The defendants also made it extremely difficult for consumers to cancel recurring charges and obtain refunds.

and freezing their assets. The order named certain specific defendants, but it also made clear that the "provisions of this Order shall be binding upon the defendants and upon their . . . attorneys . . . and all other persons or entities in active concert or participation with [the defendants] who receive actual notice of this Order. . . ." The court also appointed Appellee Robb Evans & Associates, LLC ("REA") as receiver. On February 4, 2003, the district court issued a preliminary injunction that essentially restated the terms of the temporary restraining order.

B. *Factual and Procedural Background for Robert M. Draskovich*

On January 15, 2003, REA took control of Assail's principal place of business in St. George, Utah. The next day, Kimoto retained Appellant Robert M. Draskovich to defend him in the FTC's matter and in any potential criminal matters. The day after that, January 17, Draskovich received a $200,000 retainer. The funds were wired directly to him by Alliance Solutions, Inc. ("Alliance"). On January 21, 2003, Draskovich received an additional $10,000, which was transferred to him from Valdine Management Co. ("Valdine"). Kimoto assured Draskovich that the Alliance funds were not "tainted," i.e., the funds had nothing to do with the government's allegations of telemarketing fraud.

On September 22, 2003, Kimoto, Assail, and the FTC entered into a stipulated judgment which brought the proceedings against Kimoto and Assail to a close. The court issued a judgment against Kimoto for $106 million. The judgment was suspended to the extent that it exceeded the sum generated from the liquidation of the assets in which Kimoto had an interest. All funds generated from the liquidation were ordered to be paid as consumer redress. The stipulated judgment contained a provision that allowed the defendants' attorneys to apply for fees from the

receivership estate. On October 2, 2003, Draskovich applied to the district court to allow him to retain the funds he received from Alliance and Valdine. This was in spite of the fact that in April 2003, the FTC had already requested that Draskovich return the $210,000, arguing that the funds were transferred to him in violation of the court's asset freeze order. On October 22, 2003, the FTC and REA filed motions opposing the fee application and requesting that the district court require Draskovich to turn over the $210,000 to REA. On November 13, 2003, the court denied Draskovich's application and granted the FTC and REA's counter-motions requesting repayment of the entire retainer. Draskovich now appeals from the court's November 13 order. On appeal, he argues that: (1) the district court erred in finding that the fees he received were subject to the initial asset freeze; (2) the district court's order violated his client's Sixth Amendment right to counsel; and (3) the procedures the district court used in making its decision violated due process.

C. *Factual and Procedural Background for Dean Y. Kajioka*

When REA staff took control of Assail on January 15, 2003, an Assail employee mentioned that Assail was in the process of installing certain joint equipment with Valdine. Valdine was located in the same office complex as Assail. This led REA staff to suspect that even though Valdine was not named in the FTC's complaint, it was part of Kimoto's scheme. REA's suspicions were confirmed when it visited Valdine's offices that same day. REA found Woody Davidson, Assail's head of technology, in the process of installing $100,000 worth of equipment to create a telemarketing call center, as well as linking Valdine and Assail's computer and telephone systems so that they would be fully integrated. Davidson and other Assail employees

indicated that Valdine's offices were to become the control center for Assail's telemarketing operations.

Steven Henriksen, Valdine's president, secretary, treasurer, sole shareholder, sole employee, and sole bank account signatory, was quickly informed of REA's actions by his brother, who was the Chief Financial Officer of Assail and a defendant in the underlying action. In the two weeks following REA's raid, Henriksen, at the direction of Kimoto, paid out approximately $500,000 from Valdine's accounts to secure legal representation for the various defendants.[2] During this general time period, Henriksen also paid himself approximately $130,000 in bonuses.

On January 20, 2003, Henriksen retained Appellant Dean Y. Kajioka to represent him and Valdine for an initial retainer of $60,000. The next day, Henriksen withdrew $10,000 from Valdine's account to pay part of Kajioka's retainer. The day after that, January 22, Henriksen withdrew another $50,000 to pay the remainder of the retainer.

On January 23, 2003, Kajioka called REA and objected to REA's taking possession and control of Valdine, taking particular note of the fact that Valdine was not named in any court papers. REA informed Kajioka that it believed Valdine was an affiliated entity of Assail, and thus REA would not release Valdine's assets. Kajioka's claim that Valdine was not named in any court papers was mooted as a result of the court's preliminary injunction on February 4. Unlike the initial temporary restraining order, Valdine was expressly included within the scope of the temporary injunction.

On June 2, 2003, REA's counsel sent a letter to Kajioka demanding that he return the full retainer to REA because

2. Draskovich's second payment of $10,000 came from this disbursal.

the funds had been transferred in violation of the court's asset freeze order. Kajioka refused REA's request. This refusal prompted the FTC and REA to file separate motions on August 21, 2003, requesting the court to issue an order forcing Kajioka and Henriksen to show cause why they should not be held in contempt. On September 5, 2003, the court issued such an order.

On October 2, 2003, the district court held a hearing for Henriksen and Kajioka to show cause why they should not be held in contempt. Henriksen asserted his Fifth Amendment right as to all substantive questions. Kajioka refused to testify under oath, but he did make an unsworn statement in open court. He acknowledged that he had been retained to represent Henriksen on January 20, 2003 and had received the $60,000 retainer. He also stated that he was retained to represent Henriksen in any potential criminal actions but had also provided representation in the civil case.

On October 9, 2003, the court issued an order holding Henriksen in contempt for dissipating Valdine's assets in violation of the temporary restraining order and the preliminary injunction. The court declined to hold Kajioka in contempt. The court found that because no criminal prosecution commenced, Kajioka could not have earned the entire $60,000 for services rendered in connection with Henriksen's potential criminal liability. The court did allow Kajioka to retain $10,000 for services rendered and ordered him to return the rest of the funds to REA or show cause why he should not be held in contempt. Kajioka filed several memoranda, as well as documentary evidence, with the court in support of his contention that he should be allowed to keep the full amount of the retainer. On November 26, 2003, the court issued its final order on the matter. The court reiterated its earlier determination that Kajioka was allowed

to keep $10,000.[3] Kajioka now appeals from the court's final order, raising on appeal the identical issues as Draskovich.

II. STANDARD OF REVIEW

This appeal essentially covers two issues: (1) the district court's orders concerning assets found to be part of the receivership estate; and (2) the district court's award of attorney's fees. Both issues are reviewed on an overall abuse of discretion standard, under which we review underlying factual findings for clear error and issues of law de novo. *See United States v. Melrose E. Subdivision*, 357 F.3d 493, 498 (5th Cir.2004) (reviewing under an abuse of discretion standard a request to amend an asset freeze order in order to pay attorney's fees).

III. ANALYSIS

A. Appellate Jurisdiction

On April 15, 2004, we sent a briefing notice to the parties directing them to address the following issue: "Whether the order(s) from which appeal is taken in this civil case is appealable based on the termination of the litigation, pursuant to R. 54(b), Fed. R.App., or the collateral order doctrine, or whether there exists [sic] some other bases of appellate jurisdiction. *See generally* 28 U.S.C. §§ 1291, 1292(a), (b)."

Upon reviewing both the parties' arguments and the record, we conclude that we do have jurisdiction to hear these appeals. The final section of the stipulated order

3. The court, however, slightly modified the earlier order. At some point, Kajioka took $10,000 from the initial retainer and paid it to Marjorie Guymon, another attorney who did some work on Henriksen's case. Since Guymon had already turned over her $10,000 to REA, the court determined that Kajioka needed to repay only $40,000.

entered into on September 22, 2003, states: "The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing order shall constitute a full, complete, and final settlement of this action." This order was entered on September 22, 2003. The order relating to Robert M. Draskovich was entered on November 13, 2003. The order relating to Dean Y. Kajioka was entered on November 26, 2003. Thus, both orders were entered after the underlying litigation against Kimoto was settled.

With respect to Draskovich, this chronology makes it clear that the underlying litigation is final. The same holds true for Kajioka. Kajioka's client, Steven Henriksen, never was a defendant in the underlying action. However, the true ownership of the funds in his possession, including those he used to pay Kajioka, was a question to be determined in the underlying litigation. That question was answered by the stipulated order. Thus, in both cases the district court entered a final judgment before Draskovich and Kajioka initiated their respective appeals. Essentially, the stipulated order terminated the liability phase of the case. The instant appeals concern REA's efforts to reduce Kimoto's assets to liquid form and distribute those liquid assets to victims of his fraudulent scheme. Accordingly, this court has appellate jurisdiction to hear these appeals.

B. The District Court did not Err in Finding that Draskovich and Kajioka Improperly Accepted and Maintained Possession of the Retainers

Draskovich and Kajioka argue that their acceptance of the retainers was permissible because the funds they accepted were not subject to the initial asset freeze order. Kajioka claims that at the time he was paid his retainer, Valdine and Henriksen had not been mentioned in any court

papers. Valdine and Henriksen were not specifically mentioned until the February 4 preliminary injunction was issued. Until that time, Kajioka claims there was no way he could have known that Henriksen and Valdine were subject to the asset freeze order. Kajioka further asserts that in his January 23 call to REA, he was led to believe that the seizure may have been a mistake. Similarly, Draskovich claims that when he received the funds from Alliance and Valdine, they had not been named in any court papers. Thus, in the appellants' view, to say that the transfers violated a court order would be to say that the order was violated before it ever existed.

The appellants alternatively argue that there was no way for them to know that the transfers violated the court order. The appellants argue that their ignorance is a valid excuse because they had no duty to independently investigate whether the parties paying their fees were acting in concert with the named parties. To the extent there was such a duty to inquire, Draskovich argues that he fulfilled this duty by securing Kimoto's promise that the funds with which he was being paid were not tainted.

1. *The Appellants' Fees Were Subject to the Asset Freeze Order*

The appellants' arguments fail to persuade us that the district court erred. As mentioned above, the initial ex parte temporary restraining order stated that the terms of the order covered the named parties as well as "all other persons or entities in active concert or participation with" the defendants. The district court's determination that Alliance, Valdine, and Henriksen were acting in concert with the named defendants, and thus were subject to the asset freeze, is a finding of fact that is reviewed for clear error. *Cf. Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 789-90 (9th Cir.1989) (holding that

the court of appeals could not review whether the district court's determination that a contemptor was acting in concert with a party named in an injunction was clearly erroneous because the appellant-contemptor failed to provide the necessary hearing transcripts in the record).

The record provides substantial evidence supporting the district court's determination. REA's investigation established that nearly all of the money flowing into and out of Alliance and Valdine's bank accounts came from, and was sent to, other Kimoto-controlled entities. REA found no business justification for any of these transfers. The incipient joint operation center is also highly relevant because it shows that Valdine and Assail were essentially operating as one company. Thus, we affirm the district court's finding that the appellants' fees were paid with funds subject to the asset freeze order.

2. *The Appellants Had a Duty to Inquire As to the Source of Their Fees*

The next question, then, is whether an attorney has a duty to inquire as to the source of his fee when he is put on notice that his fee may derive from a pool of frozen assets. Although this court has yet to confront this issue directly, we hold that for several reasons an attorney does hold such a duty. First, we think that accepting a fee from a pool of assets frozen by a court order is sufficiently akin to accepting a fee from the proceeds of criminal activity to make the principle applicable to the latter situation instructive here. As a general matter of professional ethics, an attorney "may not accept the fruits of the crime as a fee, for knowingly accepting the fruits of crime in return for valuable services is simply a form of aiding and abetting crime. . . ." 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.32, at 9-136 (3d ed. Supp.2005). For this reason, an attorney must " 'audit' a client sufficiently so as to avoid

becoming part of a criminal scheme that includes disposing of ill-gotten gains." *Id.* The instant case did not involve criminal charges, although it bears mentioning that both lawyers were retained for potential criminal representation. Even though criminal charges apparently did not materialize, it is clear that Kimoto committed multiple, egregious violations of the FTCA. Further, the fees in question were derived from Kimoto's fraudulent scheme. Thus, it seems entirely appropriate to apply to the instant case this general ethical obligation to "audit" a client before accepting potentially tainted fees.

Additionally, "[t]his court adheres to the well established doctrine that [a]n attorney, after being admitted to practice, becomes an officer of the court, exercising a privilege or franchise. As officers of the court, attorneys owe a duty to the court that far exceeds that of lay citizens." *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 294 (5th Cir.1997) (internal citations and quotation marks omitted) (second alteration in original). For us to hold that an attorney has no duty to investigate the source of his fees in the instant circumstances would essentially be a statement that an officer of the court has no duty to investigate whether he himself is violating a valid court order. We are not willing so to hold.

In rather similar circumstances to the instant case, the Ninth Circuit followed this officer-of-the-court rationale in holding that an attorney did have a duty of inquiry. *CFTC v. Co Petro Marketing Group, Inc.*, 700 F.2d 1279 (9th Cir.1983). In *Co Petro*, the district court appointed a receiver over a firm and permanently enjoined it from transferring or diverting any of its resources. The next day, the firm sent a $60,000 check to its law firm to cover its existing legal bill and to establish a trust account for future services. The law firm cashed the check before it received a copy of the district court's order. The receiver later petitioned the district court

to force the law firm to return the funds. The district court granted the petition. On appeal, the Ninth Circuit affirmed the district court's order, noting that:

> [a]s an officer of the court, appellant was under a duty to inquire as to the exact terms of the district court's decision [to freeze his client's assets] before depositing the check. Consequently, we agree with the district court that [the appellant] violated the permanent injunction against transfer of [the frozen] assets when it deposited the check.

Co Petro, 700 F.2d at 1285.

The Sixth Circuit's decision in *McGraw v. Connelly* (*In re Bell & Beckwith*), 838 F.2d 844 (6th Cir.1988), provides yet another rationale for imposing a duty of inquiry on attorneys. In *McGraw*, a bankruptcy trustee sought to recover $150,000 of a bankrupt firm's assets that were paid to an attorney to represent the firm's managing director in a criminal case. At the time the fee was paid, the firm had been placed into receivership and all of its assets had been frozen. The attorney acknowledged that the funds were fraudulently conveyed and that he held them pursuant to a constructive trust. However, he argued that he received the funds as a bona fide purchaser for value, and thus his rights to the funds were superior to the trustee's. The Sixth Circuit disagreed with this claim, finding that a party cannot be a bona fide purchaser where the circumstances surrounding the conveyance would lead a reasonable person to doubt the validity of the transfer. *Id.* at 849. Where such reasonable doubt exists, the court found that a party has a duty to make further inquiry. The court summarized its conclusion by stating that the attorney "was under a duty of inquiry as to the source of his fee, and this [sic] his inquiry would have

clearly revealed that his fee was derived from fraudulently obtained assets." *Id.*

Finally, the asset forfeiture provisions in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1963 (2000), and the Continuing Criminal Enterprise Statute ("CCE"), 21 U.S.C. § 853 (2000), while not applicable here, are nonetheless instructive. Under both statutes, property (including money) derived from criminal activity is subject to forfeiture irrespective of whether the criminal defendant still possesses the property. 18 U.S.C. § 1963(c) (2000); 21 U.S.C. § 853(c) (2000). However, the statutes also provide that a third-party transferee may defeat forfeiture if "the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section. . . ." 18 U.S.C. § 1963(1)(6)(B) (2000); 21 U.S.C. § 853(n)(6)(B) (2000). Based on this statutory language, it stands to reason that if an attorney has been paid with funds tainted under either RICO or the CCE and wishes to retain them, he must demonstrate that he conducted an inquiry sufficient to allow him to be "reasonably without cause to believe that the property was subject to forfeiture." In *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463 (E.D.Va.1994), the court took exactly this approach. In *Moffitt*, a law firm was retained by a client who was indicted under the CCE for the sale of narcotics. The client paid the firm's $103,800 retainer in cash using primarily $100 bills he kept stored in a cracker box. Aside from admonishing the client that the law firm could not accept "funny money," the firm made no efforts to ascertain the source of the funds. When the government sought forfeiture of the funds, the firm claimed that it was protected under § 853(n)(6)(B). The court rejected this claim, stating:

> when confronted with circumstances essentially similar to those at bar attorneys should inform

> prospective clients that they cannot pay fees with drug proceeds and that such proceeds are subject to forfeiture, even in the attorney's hands. If the prospective client answers that the money comes from legitimate sources, attorneys should take whatever further steps or ask whatever further questions may be suggested by the circumstances to satisfy themselves that it is objectively reasonable to believe the answer.

Id. at 474. The Fourth Circuit affirmed this approach, stating: "We can find no fault with the district court's conclusion." *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir.1996).

Based on the above cases and commentary, there is a clear principle that an attorney is not permitted to be willfully ignorant of how his representation is funded. While each case is distinguishable from the instant case in some way, when taken together, they teach that when an attorney is objectively on notice that his fees may derive from a pool of frozen assets, he has a duty to make a good faith inquiry into the source of those fees. Failure to make such an inquiry in the face of this duty will result in disgorgement of the funds.

3. *The Appellants Did Not Discharge their Duty of Inquiry*

The final query is whether the appellants received sufficient notice to trigger this duty of inquiry and whether they discharged the duty. The circumstances of Draskovich's fee payment should have alerted him that something was awry. He knew that his client was accused of perpetrating massive telemarketing fraud, that all of his assets were frozen, and that supposedly unrelated third parties were paying his fees. These facts should have raised

Draskovich's suspicions. Indeed, in the context of RICO and the CCE, the Supreme Court has stated that the mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value. *Caplin & Drysdale v. United States*, 491 U.S. 617, 633 n. 10, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) ("given the requirement that any assets which the Government wishes to have forfeited must be specified in the indictment, the only way a lawyer could be a beneficiary of § 853(n)(6)(B) would be to fail to read the indictment of his client") (internal citations omitted); *United States v. Monsanto*, 491 U.S. 600, 604 n. 3, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) ("An attorney seeking a payment of fees from forfeited assets under § 853(n)(6) would presumably rest his petition on subsection (B) quoted above, though (for reasons we explain in *Caplin & Drysdale* . . .) it is highly doubtful that one who defends a client in a criminal case that results in forfeiture could prove that he was without cause to believe that the property was subject to forfeiture.") (internal citations and quotation marks omitted). Once on notice, Draskovich needed to do far more than simply take his client at his word that the fees were not tainted in order to make a reasonable claim for fees. Trusting Kimoto's truthfulness unconditionally was especially unreasonable considering that he was accused of fraud, an allegation going directly to his honesty.

Kajioka may not be quite as culpable as Draskovich, which may account for the district court's decision to allow Kajioka to keep some of the fees paid to him. According to Kajioka, his client initially assured him that REA had made some mistake in seizing his office. The record suggests that REA apparently did make a few such mistakes when it initially raided Assail's offices, so Kajioka may not have been patently unreasonable in initially taking his client at his word. However, during Kajioka's January 23, 2003 call

with REA, he was given information that put him on notice that REA probably did not simply knock on the wrong door. This notice triggered a duty of inquiry, which Kajioka did not discharge. Any claim he may have for work completed before the January 23 call with REA is accounted for by the $10,000 the district court awarded him. Kajioka does not argue that this fee award was inappropriate for the several day's worth of services he then provided.

Thus, the district court properly concluded both that Draskovich and Kajioka improperly accepted their retainers and that they should turn over all (or substantially all, in the case of Kajioka) the retainers to REA for distribution to the victims of Kimoto's fraudulent scheme.

C. *The District Court's Orders did not Violate the Sixth Amendment*

Draskovich and Kajioka argue that the district court's orders violate their respective clients' Sixth Amendment rights because the orders deny the clients representation by counsel of their choice. In the appellants' view, this Sixth Amendment interest must trump the FTC's interest in obtaining restitution.

The appellants' Sixth Amendment argument is totally without merit. The most important reason the argument fails is that this is a civil case. The Sixth Amendment right to counsel is inapplicable in civil cases. *See Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n. 2 (5th Cir.2001) ("It is well settled that, because deportation hearings are considered civil in nature, there is no Sixth Amendment right to counsel."); *Sanchez v. United States Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir.1986) (per curiam) ("[T]he sixth amendment right to effective assistance of counsel does not apply to civil proceedings.").

Appendix A

D. The District Court Afforded Draskovich and Kajioka Due Process

Draskovich and Kajioka claim that their due process rights were violated because in rendering its decisions, the district court relied solely on affidavits and self-serving reports from REA. They claim that where a contemptor asserts genuine issues of material fact, it is inappropriate for a court to issue contempt sanctions without a full, impartial hearing. The appellants assert that there were several disputed issues of fact at the relevant district court hearings. They claim that in the face of these disputed issues, they were provided with only a summary proceeding in which they did not have the opportunity to face their accusers, hear the basis of their accusers' conclusions, cross-examine them, or call witnesses.

As with the appellants' Sixth Amendment argument, this due process argument is without merit. The appellants' attempt to characterize themselves as contemptors must fail for the simple reason that they were never held in contempt. This is an appeal regarding disputes between a receiver and two nonparties to the underlying case. The court resolved the dispute and backed up its resolution with the threat of contempt. Every court order is backed with the implicit threat of contempt if the order is violated. *See United States v. Fidanian,* 465 F.2d 755, 757 (5th Cir.1972) ("It is settled law that the power to punish for contempt is an inherent power of the federal courts and that it includes the power to punish violations of their own orders."). In this case, the threat was merely made explicit. Thus, the contempt issue is simply a red herring.

Although this court has not confronted directly the issue of what process is due where a receiver and a nonparty both claim the same property, the Ninth Circuit has stated clearly that in such circumstances "summary proceedings

satisfy due process so long as there is adequate notice and opportunity to be heard." *Commodities Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir.2000). It is wrong for the appellants to claim that they did not have an opportunity to respond to the claim that they did not rightfully possess the funds in question. In Kajioka's case, on October 2, 2003, the court held a hearing on the issue of whether the funds were transferred in violation of the asset freeze order. Kajioka was present at the hearing and refused the offer to cross-examine the witnesses. The fact that this hearing occurred negates Kajioka's contention that the district court relied exclusively on documentary evidence in reaching its determination. After this hearing, the court also permitted Kajioka to submit two legal memoranda briefing the relevant legal issues as well as documentary evidence. Draskovich also had an opportunity to respond. On October 2 and 30, 2003, Draskovich submitted to the court memoranda and supporting documentary evidence arguing for his position. Because the appellants actually did make the effort to respond to the charges against them, they clearly had notice of the claims. In Draskovich's case, the notion that he did not have notice is particularly fantastic because he took part in negotiating the stipulated judgment that set out the procedures by which he petitioned the court to keep his retainer.

IV. CONCLUSION

For the foregoing reasons, the orders appealed from are AFFIRMED.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION DATED AND FILED NOVEMBER 26, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

CIVIL ACTION NO. W-03-CA-007

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ASSAIL, INC., et al.,

Defendants.

In re: Dean Y. Kajioka

ORDER

By previous Order, the Court determined that Dean Y. Kajioka was not in contempt of Court. However, Mr. Kajioka was directed to return $50,000 to the Receiver. Mr. Kajioka has filed a written response to the Court's show cause order in which he argues that he should be able to retain the entire $60,000 fee paid to him by Steven Henriksen. Mr. Kajioka alternatively argues that he should only be required to repay $40,000 as $10,000 paid to Marjorie Guyman has been recovered by the Receiver. The FTC concurs that the $10,000 forwarded to Marjorie Guyman has been recovered. Having reviewed all of the briefs submitted by the parties, the Court is persuaded that Mr. Kajioka should return the amount of $40,000 to the Receiver as those funds were transferred in

violation of this Court's temporary restraining order and permanent injunction. Accordingly, it is

ORDERED that Dean Y. Kajioka shall repay $40,000 to the Receiver or appear before the Court at 9:30 a.m. on Friday, December 12, 2003 and show cause why he should not be held in contempt of court.

SIGNED this 26 day of November, 2003.

s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
Chief United States District Judge

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION DATED AND FILED NOVEMBER 13, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-03-CA-007

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ASSAIL, INC., et al.,

Defendants.

ORDER

Came on to be considered the Application for Attorneys' Fees and Costs filed by Robert M. Draskovich. Having considered the motion, the objections of the FTC and the Receiver, as well as the entire record in this case, the Court is of the opinion the motion is the application should be denied. It is clear that the fees paid to Mr. Draskovich were transferred in violation of this Court's temporary restraining order and preliminary injunction. Accordingly, it is

ORDERED that the Application of Robert M. Draskovich, Chtd. For Attorneys' Fees and Costs is **DENIED**, and Robert M. Draskovich is hereby **ORDERED** to return $210,000 to the Receiver in this case within thirty (30) days from the date of this Order or show cause why he should not be held in contempt of court.

Appendix C

SIGNED this 13th day of November, 2003.

s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
Chief United States District Judge

APPENDIX D – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION DATED AND FILED OCTOBER 9, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-03-CA-007

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ASSAIL, INC., et al.,

Defendants.

ORDER

By previous Order, the Court directed Steven Henriksen and Dean Kajioka to appear before the Court and show cause why they should not be held in contempt of court for violating the Temporary Restraining Order and Preliminary Injunction Order previously entered in this case. After a hearing, the Court finds that, by his own sworn declarations, that Steven Henriksen received notice of the temporary restraining order and preliminary injunction order entered in this case. Valdine Management Company was not a legitimate business owned by Steven Henriksen, but was merely a conduit to transfer funds owned and controlled by Kyle Kimoto and Assail, Inc. As a result, the Court further finds that Steven Henriksen transferred funds from Valdine's accounts in direct violation of this Court's temporary restraining order and preliminary injunction order and is in contempt of court.

Appendix D

In order to purge himself of contempt, Steven Henriksen must repay the sum of $369,000 to the Receiver. The Court will give Steven Henriksen until 2:00 p.m. on Thursday, October 16, 2003 to return that sum to the Receiver or to appear before the Court and explain why he should not be incarcerated until that sum is paid. If Steven Henriksen does not repay the money or appear as required, a warrant will be issued for his arrest.

The Court will not rule at this time upon the funds allegedly transferred by Steven Henriksen through American Dental Society.

The Court finds that there is insufficient proof to find that Dean Kajioka is in violation of either the temporary restraining order or the preliminary injunction order. Motions by the Receiver and the FTC to have Dean Kajioka held in contempt are **DENIED**. However, it is evident that Dean Kajioka was paid $60,000 in funds that should have been available to the Receiver. Kajioka stated that this money was paid as a retainer for a defense of Henriksen in a criminal prosecution that might be filed. No criminal prosecution has commenced; and thus Kajioka cannot have earned the entire amount. It is generous to assume he has earned $10,000 of the $60,000. Therefore, Dean Kajioka is **ORDERED** to pay $50,000 to the Receiver on or before Thursday, October 16, 2003 or appear before this Court at 2:00 p.m. on that date and show cause why he should not be held in contempt of court.

The Receiver shall submit an affidavit of fees and costs within ten (10) days from entry of this Order.

Appendix D

IT IS SO ORDERED.

SIGNED this 9th day of October, 2003.

s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
Chief United States District Judge

Supreme Court, U.S.
FILED
OCT 17 2005
OFFICE OF THE CLERK

No. 05-232

In the Supreme Court of the United States

ROBERT M. DRASKOVICH AND DEAN Y. KAJIOKA,
PETITIONERS

v.

ROBB EVANS & ASSOCIATES, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
JOHN ANDREW SINGER
Attorneys
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether petitioners had a duty to investigate whether the district court's asset freeze applied to the funds used to pay their attorney's fees, and whether they fulfilled that duty.

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In the Supreme Court of the United States

No. 05-232

ROBERT M. DRASKOVICH AND DEAN Y. KAJIOKA,
PETITIONERS

v.

ROBB EVANS & ASSOCIATES, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 410 F.3d 256. The order of the district court concerning petitioner Draskovich (Pet. App. 22a-23a) and its orders concerning petitioner Kajioka (Pet. App. 20a-21a, 24a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2005. The petition for a writ of certiorari was filed on August 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 9, 2003, the Federal Trade Commission (FTC) filed a complaint against a variety of individuals and corporations (led by Kyle Kimoto and his company Assail, Inc. (Assail)) alleging that they had engaged in a deceptive telemarketing scheme in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a),[1] and the FTC's Telemarketing Sales Rule, 16 C.F.R. 310.1-310.9. According to the FTC's complaint, the defendants told consumers that, in exchange for an advance fee, they would receive a pre-approved MasterCard credit card. The defendants debited consumers' bank accounts for $175 or more, but consumers never received the credit cards they were promised. Pet. App. 3a & n.1.

On the same day that the FTC filed its complaint, the district court entered a temporary restraining order (TRO) putting a halt to the defendants' scheme, freezing their assets, and appointing a receiver for the corporate defendants. Pet. App. 3a-4a. On February 4, 2003, the district court issued a preliminary injunction that essentially incorporated the terms of the TRO. Both the TRO and the preliminary injunction applied to all the defendants and to "their . . . attorneys . . . and all other persons or entities in active concert or participation with

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[1] Section 45(a) of Title 15 provides, in relevant part:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

[the defendants] who receive actual notice of this Order." *Id.* at 4a. On January 15, 2003, the receiver took possession of Assail's principal place of business. At the same time, the receiver also took control of the premises of a company known as Valdine Management Co. (Valdine). Valdine was located in the same office complex as Assail, was set up to perform telemarketing on behalf of Assail, and was part of the defendants' deceptive scheme. *Id.* at 5a-6a; FTC C.A. Br. 6 (No. 03-51462). Although Valdine was not named in the FTC's complaint, it was named in the preliminary injunction. Pet. App. 6a.

On September 22, 2003, the district court entered a Stipulated Injunction and Monetary Judgment against Kimoto and Assail (Judgment). The $106 million Judgment required the receiver to use all of the money that he had received from Kimoto or that had been generated from the liquidation of assets that Kimoto controlled to compensate consumers injured by the defendants' scheme. Pet. App. 4a. The Judgment included a provision that permitted counsel for the defendants to apply for payment of attorney's fees from the receivership estate. *Id.* at 4a-5a.

2. a. On January 16, 2003, after receiving notice of the TRO, Kimoto retained petitioner Draskovich to represent him in connection with the FTC's action and in any related criminal matters. The next day, petitioner Draskovich received a retainer of $200,000, which was wired to him by Alliance Solutions, Inc. (Alliance). On January 21, 2003, Draskovich received an additional $10,000, transferred to him from Valdine. Kimoto assured Draskovich that the money used to pay the retainer was not associated with the telemarketing scheme. Pet. App. 4a. In fact, that statement was false.

The record showed that, although separately incorporated, Assail, Valdine, and Alliance operated as one company, transferring assets among each other with no business justification. *Id.* at 11a; FTC C.A. Br. 8-11 (No. 03-51461).

On April 29, 2003, the FTC demanded that petitioner Draskovich return the $210,000 he had received from Alliance and Valdine. Pet. App. 5a. On October 2, 2003 (after the district court had issued the Judgment), Draskovich applied to the district court for permission to retain the $210,000. *Id.* at 4a-5a. On November 13, 2003, the court denied the application and ordered him to turn over the $210,000 to the receiver, finding that, in light of the entire record in the case, "[i]t is clear that the fees paid to Mr. Draskovich were transferred in violation of this [c]ourt's temporary restraining order and preliminary injunction." *Id.* at 22a.

b. On January 20, 2003, Steven Henriksen, who was Valdine's sole officer, shareholder, and employee, retained petitioner Kajioka to represent him and Valdine. Pet. App. 6a-7a. Henriksen used funds from Valdine's bank account to pay Kajioka's retainer in two installments: $10,000 on January 21 and $50,000 on January 22. *Id.* at 6a. On January 23, 2003, Kajioka contacted a representative of the receiver, who informed him that because the receiver believed that Valdine was an entity affiliated with Assail, the receiver would not release possession of Valdine's premises or assets. FTC C.A. Br. 12 (No. 03-51462).

On June 2, 2003, counsel for the receiver demanded that Kajioka return the retainer he had been paid from Valdine's bank account. Pet. App. 6a-7a. Kajioka refused. On August 21, 2003, both the FTC and the receiver filed motions to show cause why Kajioka should

not be held in contempt. *Id.* at 7a. The district court did not hold Kajioka in contempt but, in November 2003, it concluded that the funds paid to him had been "transferred in violation of" the asset freeze. *Id.* at 20a-21a. The court allowed Kajioka to keep $10,000, but required that he remit the remainder to the receiver (minus $10,000 that Kajioka had paid to another attorney and that the receiver had already recovered). *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-19a. The court first rejected petitioners' argument that the funds that they had accepted were not subject to the TRO. *Id.* at 9a-11a. The court observed that the TRO applied to all "'persons or entities in active concert or participation with' the defendants," *id.* at 10a, and concluded that "substantial evidence support[ed] the district court's determination" that "Alliance, Valdine, and Henriksen were acting in concert with the named defendants," *id.* at 10a-11a.

Next, the court of appeals rejected petitioners' argument that they had no duty to investigate whether Alliance and Valdine were acting in concert with the named defendants. The court explained that "[f]or us to hold that an attorney has no duty to investigate the source of his fees in the instant circumstances would essentially be a statement that an officer of the court has no duty to investigate whether he himself is violating a valid court order." Pet. App. 12a. Citing decisions from the Ninth Circuit (*CFTC* v. *Co Petro Mktg. Group, Inc.*, 700 F.2d 1279 (1983)), the Sixth Circuit (*In re Bell & Beckwith*, 838 F.2d 844 (1988)), and a district court case interpreting the criminal forfeiture statute for drug offenses, 21 U.S.C. 853 (*In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994), aff'd, 83 F.3d 660 (4th Cir. 1996), cert. denied, 519 U.S. 1101 (1997)), the court of

appeals derived "a clear principle that an attorney is not permitted to be willfully ignorant of how his representation is funded." Pet. App. 12a-15a. Rather, the court held, "when an attorney is objectively on notice that his fees may derive from a pool of frozen assets, he has a duty to make a good faith inquiry into the source of those fees." *Id.* at 15a. The court described that duty as a "general ethical obligation to 'audit' a client before accepting potentially tainted funds." *Id.* at 12a.

The court of appeals held that petitioners violated the duty of good-faith inquiry in accepting the fees. With respect to Draskovich, the court concluded that his decision to "simply take his client at his word," Pet. App. 16a, was unreasonable, because Draskovich "knew that his client was accused of perpetrating massive telemarketing fraud, that all of his assets were frozen, and that supposedly unrelated third parties were paying his fees," *id.* at 15a. The court reasoned that this Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), supported its conclusion, because those decisions made clear in a comparable context that "the mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value." Pet. App. 16a.

With respect to Kajioka, the court of appeals held that, although he may not have acted unreasonably in initially accepting the fees, once he spoke to the receiver (three days after receiving the money from Henriksen), he "was given information that put him on notice that" Valdine was affiliated with Kimoto and Assail. Pet. App. 16a-17a. That notice, the court held, "triggered a duty

of inquiry, which Kajioka did not discharge." *Id.* at 17a. The court noted that Kajioka did not dispute that the $10,000 he was permitted to retain was sufficient compensation for the three days of services that he performed before he contacted the receiver. *Ibid.*

Finally, the court of appeals rejected petitioners' contention that the Sixth Amendment trumped the FTC's right to obtain restitution for consumers injured by the defendants' deceptive scheme. The court held that petitioners' claim was "totally without merit," because "[t]he Sixth Amendment right to counsel is inapplicable in civil cases." Pet. App. 17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, this Court's review is not warranted.

1. Petitioners argue that they "had no independent duty or obligation to engage in some type of 'due diligence' to learn the source of the funds that [they were] paid as a fee," Pet. 11, and that the court of appeals' decision holding otherwise conflicts with decisions issued by other courts of appeals, Pet. 24-28.[2] Petitioners are

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[2] Petitioners contend that the court required them to "audit" their clients prior to accepting a fee. See Pet. 3, 4, 11, 23, 24, 30. Although the court of appeals did state that, in circumstances such as those presented in this case, an attorney may have an ethical obligation to "'audit' a client before accepting potentially tainted fees," Pet. App. 12a, it is clear that the court did not intend to require attorneys to conduct the sort of sophisticated financial analysis that an accountant would perform. Instead, the court held only that, when an attorney is on notice that fees may come from a pool of frozen assets, he has "a duty to make a good faith inquiry into the source of those fees." *Id.* at 15a. Thus, the court used the word "audit" merely as a shorthand for the

incorrect on both counts. In holding that an attorney has a duty of good-faith inquiry "when he is put on notice that his fee may derive from a pool of frozen assets," Pet. App. 11a, the court of appeals relied on a leading treatise on the law governing attorneys' ethical obligations, see *id.* at 11a-12a (quoting 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 9.32, at 9-136 (3d ed. Supp. 2005)), the "well established doctrine" that an attorney is "an officer of the court," *id.* at 12a, decisions from other courts, *id.* at 12a-14a, and asset forfeiture provisions in the federal criminal code, *id.* at 15a. Petitioners do not explain why the court's reliance on any of those sources is misplaced, and they do not identify any decision or rule that conflicts with the court's holding.[3]

First, the decision below does not establish "completely different standards" (Pet. 24) than those set forth in the Sixth Circuit's decision in *In re Bell & Beckwith*, 838 F.2d 844 (1988), on which the court of appeals here relied. See Pet. App. 13a-14a. In that case, a bankruptcy trustee sought to recover fees that an attorney had been paid by an insolvent debtor who was also the target of a fraud investigation. The court held

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duty to conduct a good-faith inquiry—one that goes beyond merely taking the client at his word.

[3] Petitioners' contention (Pet. 10-11) that the TRO was void for vagueness lacks merit. The TRO was not vague. It applied to, *inter alia*, those "persons or entities in active concert or participation with" the defendants. Pet. App. 4a. The record showed that Alliance and Valdine were entities that clearly fit that description. *Id.* at 5a-6a, 11a; see pp. 3-4, *supra*. Petitioners' vagueness claim thus reduces to their contention that they had no duty to investigate the source of their fee. The court of appeals correctly held that the circumstances presented to petitioners triggered such a duty, Pet. App. 15a-17a, and that fact-bound conclusion does not merit further review.

that, under Ohio law, "if the totality of the circumstances surrounding the conveyance of the assets given to [attorney] Connelly aroused suspicion, Connelly should have inquired as to the source of the property he received." 838 F.2d at 849. The court reviewed the circumstances and held that Connelly was under a "duty of inquiry as to the source of his fee." *Ibid.* Thus, *Beckwith* is entirely consistent with the decision below. See Pet. App. 15a (holding that suspicious circumstances imposed on petitioners a "duty to make a good faith inquiry" as to the source of their fees).

Second, the court of appeals' decision is not "at odds with" (Pet. 3) another case on which it relied, *CFTC* v. *Co Petro Mktg. Group, Inc.*, 700 F.2d 1279 (9th Cir. 1983). See Pet. App. 12a-14a. In *Co Petro*, the Ninth Circuit held that a law firm had to return the proceeds of a $60,000 check that it received from its client, whose assets had been frozen by the district court in an action charging it with violations of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* Because the law firm was aware that a receiver had been appointed and that a decision adverse to its client had been entered by the district court, the Ninth Circuit concluded that the law firm violated the permanent injunction by depositing the check without "inquir[ing] as to the exact terms of the district court's decision." 700 F.2d at 1285. Consistent with *Co Petro*, the court of appeals here held that petitioners had a duty to inquire about the source of their fee, given that the asset freeze applied not only to the named defendants but also to those "persons or entities in active concert or participation with" them. Pet. App. 4a, 15a.

Finally, petitioners' contention that the decision below conflicts with prior decisions of the same court in *FSLIC* v. *Dixon*, 835 F.2d 554 (5th Cir. 1987) (Pet. 25),

and *United States* v. *Thier*, 801 F.2d 1463 (5th Cir.), modified on reh'g, 809 F.2d 249 (5th Cir. 1986) (Pet. 26-28), does not justify review by this Court. This Court does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict. In both cases, the defendants argued that the district court should release frozen funds to pay attorney's fees. As the court in *Thier* explained, whether such a release should be allowed, and the amount of funds that should be released, depends on the specific facts of each case. 801 F.2d at 1474. Neither *Dixon* nor *Thier* involved an attorney's attempt to keep funds paid out in violation of an asset freeze.

In sum, petitioners have failed to identify any conflict among the circuits created by the decision below.[4] Their claim that they had no duty to investigate the source of their fee thus merits no further review.

2. Petitioners contend (Pet. 14-19) that the Sixth Amendment entitles them to keep the money they received in violation of the asset freeze. That claim is meritless. It is well settled that, as the court of appeals held (Pet. App. 17a), the Sixth Amendment right to

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[4] *In re Dolen*, 265 B.R. 471 (Bankr. M.D. Fla. 2001), cannot create a circuit conflict because it is not, as petitioners mistakenly contend, a decision of the Eleventh Circuit. See Pet. 4, 25-26. In any event, *In re Dolen* is irrelevant. It merely holds that, if the FTC obtains an asset freeze, and if the target of that freeze invokes the protection of the Bankruptcy Code, the automatic stay provision of the Code precludes the FTC from enforcing the freeze against assets that were obtained by the debtor subsequent to the bankruptcy petition and that were unrelated to the conduct challenged by the FTC. 265 B.R. at 485. Unlike *In re Dolen*, there was no bankruptcy at issue here and no indication in the record that the funds paid to petitioners were obtained after entry of the asset freeze.

counsel does not apply to civil cases. See *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25 (1981).[5] Petitioners nevertheless contend that the Sixth Amendment applies because they were retained not only for the FTC's civil action, but also for "pending criminal investigations." Pet. 16. Even assuming a criminal investigation had been commenced by some agency other than the FTC (which has only civil enforcement authority, see 15 U.S.C. 57b), the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks omitted); see *Fellers* v. *United States*, 540 U.S. 519, 523 (2004). Because petitioners do not even allege that such proceedings occurred here, their Sixth Amendment claim lacks merit and does not warrant further review.[6]

3. Petitioners also ask this Court (Pet. 9-14, 19-22) to review the inquiries they did conduct upon receiving the fees, and to find that those inquiries were sufficient

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[5] Indeed, every case cited by petitioners in support of their argument involved a criminal, not a civil, defendant (or counsel for a criminal defendant). See *Wheat* v. *United States*, 486 U.S. 153 (1988) (Pet. 15); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (Pet. 15); *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir. 1978) (Pet. 15); *Thier*, *supra* (Pet. 15); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989) (Pet. 17); *United States* v. *Monsanto*, 491 U.S. 600 (1989) (Pet. 17).

[6] Moreover, even if petitioners' clients had been subject to formal criminal proceedings, this Court made clear in *Caplin & Drysdale* that the Sixth Amendment only "guarantees defendants in criminal cases the right to adequate representation," 491 U.S. at 624, not "representation by an attorney that [they] cannot afford," *ibid.* (quoting *Wheat*, 486 U.S. at 159).

under the circumstances. As the court of appeals recognized, the nature of the appropriate inquiry that an attorney must conduct depends on the particular fact situation. Pet. App. 15a-17a. The court here carefully examined the record and found that, whereas petitioner Draskovich should have been aware from the outset that "something was awry," *id.* at 15a, and thus "needed to do far more than simply take his client at his word that the fees were not tainted," *id.* at 16a, petitioner Kajioka may not have received such inquiry notice until three days after he was paid, *id.* at 16a-17a. Accordingly, the court held that Draskovich had to return his entire fee, but Kajioka could keep $10,000 of the amount he received. That fact-bound conclusion does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
JOHN ANDREW SINGER
Attorneys
Federal Trade Commission

OCTOBER 2005

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No. 05-232

IN THE

Supreme Court of the United States

ROBERT M. DRASKOVICH and DEAN Y. KAJIOKA

Petitioners,

v.

ROBB EVANS & ASSOCIATES, L.L.C. and FEDERAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS ASSOCIATION OF DEFENSE COUNSEL AS AMICUS CURIAE SUPPORTING PETITIONERS

ROGER C. DISEKER
Counsel of Record
MARSHALL M. SEARCY, JR.
WILLIAM N. WARREN
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500

Attorneys for The Texas Ass'n of Defense Counsel as Amicus Curiae

197340

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INTEREST OF AMICUS CURIAE

The Texas Association of Defense Counsel ("TADC")[1] is the largest state association of civil trial, personal injury defense and commercial litigation attorneys in the United States, whose practice is concentrated on the defense of civil tort lawsuits. The TADC is devoted to the just and efficient administration of civil justice. To that end, it advocates a system of tort reparations in which (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable only for appropriate damages.

The TADC's interest in this matter arises from the fact that its members are primarily defense counsel who, due to the nature of their representation, will be most affected by the Fifth Circuit's underlying opinion. Because the TADC believes that such opinion creates an unreasonable and (practically speaking) unworkable standard that conflicts with more realistic standards of other circuits, it requests that the Court resolve the conflict and, in so doing, create a more balanced analysis that considers the interests of all involved. Further, if the opinion remains in force, the TADC believes that a defendant's ability to exonerate himself may be financially crippled from the very beginning, and will require defense counsel to question his client's honesty on little more than his accuser's allegations.

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1. This brief has been authored in its entirety by undersigned counsel for the amicus curiae. No person or entity, other than the named amicus and its counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

SUMMARY OF ARGUMENT

The Fifth Circuit has determined that when a lawyer is asked to represent a client accused of fraud and had all his assets frozen in an *ex parte* proceeding (so that a third party must necessarily agree to pay his fees), then that attorney is on notice that any fee payments may be funded by an improper source; consequently, says the Fifth Circuit, the lawyer has a duty to "audit" relevant books and records before accepting the fee and beginning representation. Otherwise, and apparently despite the emergency nature of the client's circumstances, the defense lawyer accepts such legal representation at his peril.

The TADC respectfully suggests three problems with this opinion that require resolution. First, that the Fifth Circuit sets too slight a trigger for the duty to inquire (whether that duty is to audit or otherwise), and that such conflicts with the decisions of the Third and Sixth Circuits in *In re Bressman (Wasserman v. Bressman)*, 327 F.3d 229 (3d Cir. 2003), and *In re Bell & Beckwith (McGraw v. Connelly)*, 838 F.2d 844 (6th Cir. 1988), respectively. Second, even if the trigger should be as slight as the lower court suggests, the duty to "audit" a client's books and records before beginning representation is unreasonable, especially in light of the emergency circumstances then confronting the client, and is in conflict with other circuits. And third, before concluding that a defense lawyer must disgorge his fee, a district court should be required to consider the circumstances at issue at the time the fee is paid (rather than after a judgment is entered or agreed), so as to balance the need to protect assets garnered by an alleged wrongdoer against the danger of placing the financial reins of a defendant's defense entirely in the hands of the plaintiff/prosecution. Otherwise, every counsel who agrees to accept representation will do so at his own risk, and necessarily ties compensation to success on the merits. This, perforce, creates an atmosphere antagonistic to compromises, plea agreements, and the swift and expedient administration of justice.

ARGUMENT

Mindful of Rule 37.2, the TADC first states simply that it agrees with the arguments made by Petitioners in their *Petition for Writ of Certiorari.* In addition, the TADC offers the following bases for granting the requested writ:

I. The Fifth Circuit's Opinion Is Unreasonable in this Instance Because It Sets Too Low a Standard for Triggering a Duty of Inquiry into the Source of Defense Fees, so that In Virtually Every Circumstance in which an *Ex Parte* Asset Freeze Is Ordered or a Constructive Trust Is Alleged, a Duty of Inquiry Is Mandated; as such, the Standard Imposed Conflicts with Decisions from the Third and Sixth Circuits that Have Applied Reasonable Standards.

Two circuit opinions have directly addressed in what circumstances a defense attorney has a duty to inquire as to the source of his fees. Those are *In re Bressman (Wasserman v. Bressman)*, 327 F.3d 229 (3d Cir. 2003), and *In re Bell & Beckwith (McGraw v. Connelly)*, 838 F.2d 844 (6th Cir. 1988). As noted below, the Third and Sixth Circuits utilized a reasonable, workable standard in those opinions that conflicts with that followed by the Fifth Circuit.

A. In re Bell & Beckwith and In re Bressman.

1. In re Bell & Beckwith.

In *Bell & Beckwith*, a bankruptcy trustee sought the return of $150,000 worth of items advanced by the debtor brokerage firm's managing partner to his criminal defense attorney. 838 F.2d 844 (6th Cir. 1988) The court found that the managing partner had "bilked" the brokerage firm out of $47,000,000 over a span of years to fund his personal investment in various ventures, including a Las Vegas hotel and casino. *Id.* at 845. His fraud unraveled over a span of a

few days. On February 5, 1983, the brokerage firm was placed in receivership by the Securities and Exchange Commission ("SEC"). 846 Immediately thereafter, the United States Attorney's Office initiated an investigation. *Id.* at 846-47. On that same day, the managing partner confessed his fraud to his personal attorney, Frank McManus. *Id.* at 846. Recognizing the need for a more experienced criminal defense attorney, McManus began attempting to contact William M. Connelly and engage him on behalf of the client. *Id.* However, McManus's initial efforts to contact Connelly were unsuccessful. *Id.*

On February 6, 1983, the managing partner and his wife assigned all their assets to the brokerage firm to offset the debts incurred by the fraud and, hopefully, avoid the closure of the brokerage firm. *Id.* The next day, McManus finally reached Connelly, who agreed to represent the client. *Id.*

On February 9, 1983, Connelly learned from reading the local newspaper that his client and client's wife had assigned their assets to the brokerage firm. *Id.* at 847. On that day, he sent a letter repudiating the assignment to the firm. *Id.* The following day, he accompanied his client to an interview conducted at the United States Attorney's Office by the Federal Bureau of Investigation. *Id.* During that interview, and with Connelly present, Connelly's client represented that his fraud involved at least $36,000,000, that stock in Toto, Ltd. ("Toto") was used to effectuate the fraud, that a margin account in the name of TZ Land and Cattle ("TZ") was used to effectuate the fraud, and that the client had been covering losses to his investment in the Landmark Hotel (and casino) in Las Vegas. *Id.* He further stated that the trading and bank accounts were held in his wife's name. *Id.*

The following day, Connelly received a briefcase containing, among other things, jewelry embossed with the

insignia of the Landmark Hotel, $100,000 in Treasury notes, and shares of Toto and TZ. *Id.* This stock and jewelry represented payment for Connelly's legal services.

After the brokerage firm was placed in bankruptcy, the trustee claimed the bankruptcy estate held an interest in the funds paid to Connelly. *Id.* at 848. Following a bench trial on that issue, the presiding magistrate found that Connelly was a good faith purchaser for value, and that he had no "inquiry" notice of the of the estate's interest in the property. *Id.* In reaching his decision, the magistrate applied an "insolvency" standard, opining that if Connelly reasonably believed that his client could satisfy the harm caused by his fraud and still remain solvent, then Connelly took in good faith. Finding Connelly reasonably held such a belief, the magistrate held in Connelly's favor. *Id.*

Holding the magistrate's fact findings clearly erroneous, the Sixth Circuit reversed. *Id.* at 849. Applying Ohio law of constructive trusts, the Sixth Circuit accepted the trustee's proposed "nature-of-the-property" standard.[2] *Id.* Simply stated, Sixth Circuit concluded that the very nature of the property Connelly received should cause a reasonable person to inquire into its origin. *Id.* In particular, the court noted that two days after learning his client's assets were assigned to the brokerage firm and one day after his client admitted utilizing Toto, TZ and the Landmark Hotel to effectuate his fraud, the client sent Connelly a briefcase filled with Toto and TZ stock, and jewelry embossed with the Landmark Hotel insignia. *Id.* Thus, because the nature of the property would have aroused the suspicion of a reasonable person, Connelly was deemed to have knowledge that any inquiry excited by

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2. The Trustee appealed the trial court's decision under Ohio common law governing bona fide purchasers, and bankruptcy statute 11 U.S.C. § 548 (West 1987). Finding that Ohio common law required reversal, the Sixth Circuit never addressed the issue under § 548.

that suspicion would have yielded. *Id.*, citing RESTATEMENT OF RESTITUTION § 174, *Lewis v. Akerberg*, 100 Ohio App. 209, 218, 136 N.E.2d 372, 379 (1954), and OHIO JUR.3D, "Notice," § 18 (1987). Moreover, because the very nature of the property and the facts Connelly necessarily knew showed the property he received was involved in his client's fraud, the Sixth Circuit remanded with instructions to the district court to enter judgment for the bankruptcy trustee. *Id.* at 850.

2. *In re Bressman.*

In *Bressman*, a law firm, Cole, Shotz, Meisel, Forman & Leonard, P.A. ("Cole Shotz") had been hired to represent a Chapter 11 debtor who declared bankruptcy in July 1996. 327 F.3d 229, 233 (3d Cir. 2003). At the time that representation began, Cole Shotz informed the debtor/client that its fees had to be paid from non-estate assets. *Id.* Thereafter, Cole Shotz received payments from various sources, including accounts held by the debtor's wife. *Id.*

Also in the summer of 1996, the SEC began a fraud investigation against the debtor. *Id.* After the investigation began, the debtor's wife hired the firm Newman & Schwartz ("Newman") to represent her. *Id.* At the time their representation began, Newman was assured that the wife had independent means, separate from the debtor, to pay Newman's fees. *Id.*

After approximately one year, the bankruptcy was changed from a Chapter 11 to a Chapter 7 bankruptcy, and a trustee was appointed. *Id.* Following his appointment, and before several fee payments were made, the trustee informed Cole Shotz and Newman that he was investigating the source of their payments, as he believed they had come from estate assets. *Id.* at 234.

Following the trustee's investigation, it came to light that a trust account established in the Cook Islands had transferred funds to the wife's account shortly before each check was written to pay fees. *Id.* Moreover, that trust account held assets of the bankruptcy estate. *Id.* The trustee demanded that the firms return their fees and then filed a summary judgment, claiming that, at a minimum, the firms were on "inquiry" notice at the time the trustee informed them that it was investigating the source of their fee payments. *Id.* The firms responded and filed cross-motions, claiming that they had been assured that their fees came from non-estate sources, and that a duty to inquire had not been triggered before the payments were received. *Id.* The bankruptcy court granted judgment for the firms, finding them to be good faith transferees for value. *Id.* at 235. The district court affirmed that decision. *Id.*

The Third Circuit affirmed the district court's decision. The court first noted that bankruptcy statute 11 U.S.C. § 550(b)(1) governed the matter. *Id.* at 235-36. Section 550(b)(1) states that "a trustee may not recover . . . from (1) a transferee that takes for value . . . , in good faith, and without knowledge of the voidability of the transfer avoided."[3] Relying of other circuit courts interpreting this statute to conclude that "a transferee has knowledge if he knew facts that would lead a reasonable person to believe the property transferred was recoverable," the Third Circuit applied a "duty of inquiry" analysis. *Id.* at 236, citing *In re Sherman*, 67 F.3d 1348, 1357 (8th Cir. 1995). In particular,

3. Unlike *Bell & Beckwith*, the Third Circuit never addressed the common law of New Jersey or New York, where it appears the act occurred, regarding bona fide purchasers. Indeed, it does not appear from the opinion that appellant addressed the issue. However, it does appear that the issues were nevertheless the same under a § 550(b)(1) analysis; that is, whether defense counsel gave value, and whether defense counsel was on notice of that the funds paid to him belonged to (and were recoverable by) the bankruptcy estate.

the court stated that "the issue is whether the facts known to the firms and the reasonable inference to be drawn from those facts would affirmatively suggest to a reasonable person in their position that they were receiving assets of the estate. If not, there would be no duty to investigate." *Id.* at 237.

Following this analysis, the court noted that the affidavit testimony established that the debtor's wife had assured Newman that she could independently pay attorneys' fees, and that Cole Shotz had altered its fee arrangement following the institution of Chapter 7 proceedings. *Id.* at 237-38. The court further noted that the firms had each devoted a substantial amount of time representing the debtor and his wife, actions the court noted a sophisticated firm would not have taken had it been aware of a fee payment issue. *Id.* at 238.

The court also held that the trustee's argument that he put the firms on notice by informing them of his own investigation, was probative of nothing. *Id.* at 238-39. Rather the court noted that the trustee had a duty to pursue assets of the estate, and the fact he was investigating the source of the fee payments was not probative of whether the firms had reason to believe their fees were paid with estate assets. *Id.* at 239. Consequently, knowledge of the trustee's investigation did not put the firms on notice that they should do the same.

B. The Fifth Circuit's Decision Conflicts with Bell & Beckwith and Bressman as to When a Duty of Inquiry Is Triggered.

The Fifth Circuit's decision conflicts with the Third and Sixth Circuit concerning when a duty of inquiry is triggered. As the facts of each case shows, a wide discrepancy now exists as to when a lawyer has a duty to inquire into the source of his legal fees.

As drawn from the Fifth Circuit's opinion, the facts are as follows:

January 9, 2003: FTC filed a complaint in the Western District of Texas (Waco Division) against the Utah-based defendants Assail Inc. ("Assail") and Kyle Kimoto. Neither Valdine Management Co. ("Valdine") or Alliance Solutions, Inc. ("Alliance") were named or otherwise identified.

The district court entered an *ex parte* temporary restraining order at the FTC's request that, *inter alia*, froze the defendants' assets. The order further made it binding on the defendants and "their . . . attorneys . . . and all other persons or entities in active concert or participation with [the defendants] who receive actual notice of this Order. . . ."

The court appointed Robb Evans & Associates, LLC ("REA") as receiver.

January 15, 2003: REA raided and took control of Assail's office in St. George, Utah, as well as Valdine's offices, which were located in the same office complex. (Also according to the Fifth Circuit's opinion, the record suggests that REA made "a few . . . mistakes when it initially raided Assail's offices," including raiding the wrong offices).

January 16, 2003: Kimoto retained Draskovich.

January 17, 2003:	Alliance paid a $200,000 retainer to Draskovich. Alliance was not named in the TRO.
January 20, 2003:	Valdine and Steven Henriksen, Valdine's president, secretary, treasurer, sole shareholder, sole employee and sole bank account signatory, retained Dean Kajioka.
January 21-22, 2003:	Henriksen withdrew $60,000 from Valdine's account to pay Kajioka's retainer. Valdine was not named in the TRO.
January 21, 2003:	Valdine paid an additional $10,000 to Draskovich.
February 4, 2003:	Preliminary injunction was entered with essentially the same terms as the TRO.
September 22, 2003:	Kimoto, Assail and the FTC entered a stipulated judgment of $106,000,000. Such judgment contained a provision allowing the defendants' attorneys to apply for fees from the receivership estate.
October 2, 2003:	Draskovich applied for fees.

From these facts, the Fifth Circuit concluded that a duty of inquiry was triggered as of January 20, 2003. In particular, the Fifth Circuit found that Draskovich knew on that date that his client was accused of perpetrating telemarketing fraud, that all his assets were frozen, and that unrelated third parties would pay his fees. Appendix A, p. 15a-16a.

Accordingly, says the Fifth Circuit, "[t]hese facts should have raised Draskovich's suspicions." *Id.* However, if that is true, then *anytime* a lawyer's potential client has had his assets frozen then a duty of inquiry is triggered. The trouble with this analysis is that, if followed, a defense attorney will automatically be placed on a duty of inquiry in fairly common fact situations. Setting aside, for now, the cumbersome "audit" duty the court also imposes, the Fifth Circuits overly sensitive trigger necessarily conflicts with *Bressman* and *Bell & Beckwith*.

The most telling indicator of a circuit conflict is that the Fifth Circuit's analysis, if applied by the Third and Sixth Circuits, would yield different results. Indeed, consider first the Fifth Circuit's finding in the context of the *Bressman* facts. There, the two firms involved knew that debtor's assets were part of a bankruptcy estate and under trustee control. *Id.* at 233. They also knew that the client was accused of securities fraud by the SEC. *Id.* Finally, they knew that their fees would have to be paid by a separate source. *Id.* at 233 and 238. According to the Fifth Circuit, this triggers the duty of inquiry/audit, and assumes knowledge of all the facts an audit would reveal. The Third Circuit, however, held otherwise, holding that no duty of inquiry was triggered, despite the fact that the bankruptcy trustee informed the firms, in writing, that it suspected the firm's fees were improperly funded before the fees were paid. *Id.* at 238-39.

Moreover, though the result in *Bell & Beckwith* would be the same, the Third Circuit's analysis would have never occurred. As with *Bressman*, the defense attorney knew before being paid that his client had been accused of perpetrating a fraud against his employer brokerage firm. He also knew that the brokerage firm's assets were subject to a receivership. *Id.* at 846-47. Such facts, however, did not trigger a duty under the "nature of the property" analysis followed there. As that opinion shows, the Sixth Circuit's

reasoning was based on the fact that the nature of the property paid to defense counsel established its origin in entities the client had admitted defrauding. *Id.* at 849. Under the Fifth Circuit's opinion, such analysis would not even be necessary. The mere facts that the lawyer knew the accusations against his client and that his assets were subject to a receiver's control would trigger a duty to audit and, ultimately, forfeit payment of his fees.

Moreover, consider another common fact pattern. A client is served with a complaint in which he is accused of wrongdoing, including fraud. Included in the complaint is a request for a constructive trust, claiming that all the funds the defendant has gained through his business were garnered through fraud, and are held in trust for the plaintiff. Though not an asset freeze, it is clear that the potential client is claimed to hold funds that do not belong to him, and instead, in trust for another. Thus, the attorney knows the client is accused of fraudulently conducting his business, that the funds received in his business allegedly belong to others, and that the only way the client can pay attorneys' fees without employing supposedly tainted funds is to use a separate source for payment. Under current Fifth Circuit authority, these facts give rise to a duty by the defense attorney to audit the source of his payment or run the risk of being sued for what he was paid.

This "trigger of inquiry" issue cannot be departed without addressing another troubling aspect of the opinion; that is, the adversarial role the Fifth Circuit necessarily creates between the defense attorney and his client. According to that court, the very fact that the client has been accused of fraud should make the attorney suspect an impropriety with regard to his fee payment. In particular, that court found that "[t]rusting [the client's] truthfulness unconditionally was especially unreasonable considering that he was accused of fraud, an allegation going directly to his honesty." *Petitioner's*

App. A, p. 16a. This statement follows a brief analysis of law governing 21 U.S.C § 853. Section 853, which is not applicable here, vests ownership of assets gained through certain criminal enterprises in the federal government. However, the Fifth Circuit used this analysis to suggest that *anytime* a client is accused of fraud, his attorney should distrust his representations. In essence, the *law* should presume the client not guilty, but his lawyer should not.

This is troubling because it creates a precedent requiring a lawyer to be suspicious of his client's integrity knowing nothing more than the allegations made against him. When a defense lawyer first meets with a client to discuss representation, that client is there because he is accused of wrongdoing. Not to be trite, but it is not a social call. If the fact that a client is accused of acting improperly or illegally forces an attorney to question his client's character, then his representation of that client is chilled before it begins. That is not to say that circumstances cannot arise that may require an attorney to do just that. But, the fact that allegations have been made and an *ex parte* ordered entered should not force counsel to question his client's truthfulness automatically.

II. The Fifth Circuit's Opinion Is Also Unreasonable Because, Following the Near Automatic Triggering of the Duty of Inquiry, the Court Has Turned that Duty of Inquiry into a Duty to Audit. Such Is Unworkable Because to Require Defense Counsel to "Audit" Mandates Defense Counsel to First Perform a Formal Investigation of the Client's Books of Account before Providing Legal Services, thereby Placing the Client/ Defendant's Immediate Interests and Needs at Risk.

According to the Fifth Circuit, an accusation coupled with an *ex parte* asset freeze automatically forces the attorney to conduct an audit into the source of a retainer necessarily funded by a third-party. Thus, in addition to performing the numerous functions necessarily attendant to representing a client already the subject of extraordinary relief, the Fifth Circuit finds it reasonable as a matter of law to subject counsel and client to a further auditing duty. The TADC contends that such is an unreasonable burden under this, or any, circumstance.

As defined by Websters Dictionary, "audit" means as follows:

> **1 a:** a formal or official investigation and verification of books of account (as for reporting on the financial condition of a business at a given date or on the results of its operations for a given period) **b:** a methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings: a rendering and settling of accounts **2:** the final report following a formal examination of books of accounts; an account as adjusted by auditors: final statement of account. . . .

WEBSTERS NEW THIRD INTERNATIONAL DICTIONARY, p. 143 (Merriam-Webster 1986). Inasmuch as the Fifth Circuit failed

to provide any different meaning, practitioners are left with such a common and ordinary usage to determine what the dictates of the opinion require. Thus, as matters now rest, if a practitioner is confronted with a client whose assets are frozen and in desperate need, but with a third-party willing to fund defense costs, then the lawyer must first perform an audit. Otherwise, the attorney begins representation without any assurance he will be compensated. According to the "audit" definition, this includes a formal investigation or examination of books of account to determine the source of any funds used to pay him. This, of course, is a lengthy and expensive process.

The TADC respectfully contends that adding an audit to the already daunting tasks facing defense attorneys in such circumstances is unreasonable. Typically, once the accused informs his newly-retained counsel of a restraining order and the upcoming preliminary injunction hearing, the attorney is already faced with performing numerous tasks to fulfill his role as a zealous advocate. Excluding any special circumstances, the attorney duties include timely answering, requesting and performing expedited discovery, conducting legal research, writing briefs, and preparing for an evidentiary hearing concerning the merits of the asset freeze. Now, on top of that, the attorney is further required to undertake an "official investigation" or "verification of books of account" to determine the source of his fees. The Fifth Circuit demands this audit despite his client's assurances (as in this case) that the funds are not tainted and the paying third party has not been specifically named in the asset freezing order.

As the underlying facts illustrate, performing an investigation of books of account takes no small amount of time. The receiver here seized the defendants' (and other) offices on January 15, 2003. *Petition*, App. A, 4a. Nonetheless, he made no demand for the fees paid until June 2, 2003. *Id.* at 6a-7a. Thus, the receiver, who held access to and control over the defendant's offices and books, required

four and one-half months to conclude the fee source was tainted. But, it is now expected that the defendant's counsel, whose client has been stripped of access to much of the books of account, should conduct an audit in a necessarily expedited manner, and further require the client (whose guilt or innocence remains in question) to wait in limbo until the process is concluded before knowing whether he has representation.

III. The Fifth Circuit's Opinion Ignores Concerns Associated with Presuming a Defendant Has Committed Wrongdoing Prior to a Judgment, and with Giving the Plaintiff/Prosecution Financial Control over the Defendant's Ability to Defend Himself from His Accuser's Allegations.

A. Federal Savings & Loan Insurance Corp. v. Dixon.

The Fifth Circuit previously addressed, in what circumstances, frozen assets should be used to pay defense fees in *Federal Savings & Loan Insurance Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987). The facts of *Dixon* were, unfortunately, not unique in the 1980s. After seizing control of a certain savings and loan, the FSLIC discovered that reality did not coincide with the assets shown on its books; and further, that the savings and loan had paid allegedly exorbitant salaries and bonuses to several officers and directors. *Id.* at 556-57. The FSLIC then sued the officers and directors, and at the outset gained an order (and later, preliminary injunction), restraining the individual defendants from using assets garnered from the savings and loan. *Id.* However, the court did allow the defendants to use $3500 per month the pay personal expenses. *Id.* at 557. Nothing in the opinion suggests a criminal investigation was being pursued.

In addressing the issue before it, the Fifth Circuit made two unavoidable observations: (1) that the defendants were simply accused of wrongdoing at the time the limiting injunction was entered, and that the court could not "assume the wrongdoing before judgment in order to remove the defendants' ability to defend themselves"; and (2) the very "basis of our adversary system is threatened when one party gains control of the other party's defense. . . .". *Id.* at 565. Having concluded that even were an attorney to charge $100 an hour, and further assuming the entire $3500 were available for such fees, the most that the defendants could receive was 35 hours of attorney time a month — "not a significant amount in major litigation." *Id.* at 564. Thus, the Fifth Circuit concluded that if the defendant can show he cannot pay for a defense without using frozen assets, then the court should allow such assets to be used. To offset any fear of using the guise of fees to mask other uses, such requests could be tempered by the opposing party's ability to show the likelihood of an impropriety resulting from the defendant's request. *Id.* at 565. In essence, the court found it necessary to balance the defendant's right to defend himself against the risk such right may be used to conceal an inappropriate bilking of the protected assets. *See also United States v. Thier*, 801 F.2d 1463, 1474-75 (5th Cir. 1986).

B. The Fifth Circuit's Underlying Opinion Fails to Balance the Defendant's Need to Defend Himself Against the Need to Protect Assets.

As noted, the court in *Dixon* expressed concern that, even in civil actions brought by a government agency (or pseudo-agency such as the FSLIC), the defendant's right to counsel must be considered, so that even if only frozen assets are available to fund defense costs, such assets should be made available with court supervision. Here, however, such issue was entirely ignored. The Fifth Circuit's opinion establishes that the district court was presented with whether the defense counsel should be entitled to keep some or all of their compensation,

even if indirectly paid from frozen assets. In particular, the court noted that the agreed judgment allowed the defense counsel an opportunity to apply for fees against the receivership estate. *Petition*, App. A, pp. 4a-5a. Further, Draskovich filed such an application on October 2, 2003 to which the FTC responded on October 22, 2003 and which the district denied on November 2, 2003. *Id.* However, in its opinion, the Fifth Circuit never addressed whether the receivership estate should be required to fund some portion of the attorneys' fees.

If this Court believes the *Dixon* opinion is correct, then the Fifth Circuit's opinion here is necessarily wrong. As above noted, the court in *Dixon* found that it set a dangerous precedent to assume wrongdoing before judgment, and then strip the defendant of its ability to employ counsel based on that assumption. Yet this is exactly what has happened in the underlying case.

Admittedly, the underlying facts indicate that the defendants stipulated to committing wrongdoing through an agreed judgment entered in September 2003. Indeed, this played no small part of the Fifth Circuit's opinion:

> The instant case did not involve criminal charges, although it bears mentioning that both lawyers were retained for potential criminal representation. Even though criminal charges apparently did not materialize, it is clear that [the client] committed multiple, egregious violations of the FTCA. Further, the fees in question were derived from Kimoto's fraudulent scheme. Thus, it seems entirely appropriate to apply to the instant case this general ethical obligation to "audit" a client before accepting potentially tainted fees.

Petition, App. A, p. 12a. The problem with this reasoning lies in the fact that, as of January 20, 2003, there was no

agreed judgment, there were no stipulated facts, and there was no reference to Valdine or Alliance in any pending order. Thus, the Fifth Circuit applied post-judgment circumstances to find what defense counsel should have known within days of being approached for representation. Because of this, authority now exists for the propositions that: (1) a lawyer (and trial court's) should presume a client's guilt before it is ever established; and (2) a client who has no other recourse but to use potentially tainted funds for a defense should be entirely disallowed from doing so, thereby resting control over his defense entirely in his accuser's hands. Both of these are directly at odds with the Fifth Circuit's concerns in *Dixon*, and run counter to the notion that a defendant is innocent till proven otherwise, and that a plaintiff bears the burden of disproving such innocence.

Finally, it is noteworthy that the decision may affect counsel's ability to advise his client objectively as to when to settle and when to fight. This question is highlighted by the facts of the underlying case. Indeed, the defense counsel may have been better off to continue fighting the lawsuit, knowing that the only way to be paid is through the hope of complete absolution, rather than, less than nine months after the case began, entering a stipulated judgment that ends the matter.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROGER C. DISEKER
Counsel of Record
MARSHALL M. SEARCY, JR.
WILLIAM N. WARREN
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500

Attorneys for The Texas Ass'n of Defense Counsel as Amicus Curiae